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ABSTRACT

The meetings of the American Indian Policy Review Commission on January 6, 1977, were concerned with the markup of the first draft of the final report, the status of the Commission extension, training, distribution of task force reports, and transition coordination. The session on February 4 opened with the announcement that the Senate had passed the joint resolution introduced by Senator Abrouzek for an extension of three months for the Commission. The Commission questioned sovereignty and constitutional rights and contemplated the issue of defining "Indian" and "tribe". During the discussion on trust responsibility, Commissioner Whitecrow expressed the Indian's viewpoint of "land--as the Mother Earth, the sustenance of life, giving life with growth and minerals of that specific soil and it gives life and it takes life". He stressed trust responsibility as the Government's obligation to fulfill responsibility in delivery of services and protect those services agreed to provide the Indian tribes. A brief session discussed social services, specifically child placement, health services, and education. (AN)

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U.S. SENATE
SELECT COMMITTEE ON INDIAN AFFAIRS

MEETINGS OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION

JANUARY 6, 7, FEBRUARY 4 AND 5, 1977

WASHINGTON, D.C.

VOLUME 5

U S DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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MEETINGS OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION

THURSDAY, JANUARY 6, 1977

AMERICAN INDIAN POLICY REVIEW COMMISSION,
Washington, D.C.

The Commission met, pursuant to notice, at 10 a.m., in room 1224, Dirksen Senate Office Building, Senator James Abourezk (chairman of the Commission) presiding.

Present: Senator James Abourezk, chairman; Commissioners Ada Deer; John Borbridge; Adolph L. Dial; Louis R. Bruce; Jake Whitecrow; and Congressmen Sidney R. Yates; Lloyd Meeds.

Staff present: Ernest L. Stevens, staff director; Ernestine Ducheneaux; Peter Taylor; Paul Alexander; Ray Goetting; Donald Wharton; Charles Wilkinson; Dr. Patricia Zell; Max Richtman; Gil Hall; and Alan Parker.

Chairman ABOUREZK. The American Indian Policy Review Commission meeting will come to order.

The purpose of this meeting today is to begin markup of the first draft of the final report, parts of which we have, parts of which are not ready in the draft stage that we need them.

I want to ask, before I turn to the staff, if any of the Commission members have anything they would like to say by way of opening?

The word is get the show on the road. Ernie Stevens, please tell us what your first item of business is.

Mr. STEVENS. We want to cover some Commission business first: The status of the Commission extension, the training, distribution of task force reports, some of the transition coordination, and then we will get into the draft reports themselves.

Do you need to call the roll?

Chairman ABOUREZK. No.

Mr. STEVENS. All right, Max.

Mr. RICHTMAN. This should only take a few minutes.

Mr. YATES. Let the record show that Commissioner Yates is present.

Chairman ABOUREZK. I would like to ask the clerk to call the roll.

Ms. DUCHENEAUX. Commissioner Borbridge?

Commissioner BORBRIDGE. Present.

Ms. DUCHENEAUX. Commissioner Bruce.

Mr. BRUCE. Present.

Ms. DUCHENEAUX. Commissioner Deer.

Commissioner DEER. Present.

Ms. DUCHENEAUX. Commissioner Dial?

Commissioner DIAL. Present.
Ms. DUCHENEAUX. Senator Hatfield? No response.
Congressman Meeds. No response.
Senator Metcalf. No response.
Commissioner Whitecrow?
Commissioner WHITECROW. Present.
Ms. DUCHENEAUX. Congressman Yates?
Mr. YATES. Present.
Ms. DUCHENEAUX. Senator Abourezk?
Chairman ABOUREZK. Present.
Ms. DUCHENEAUX. Seven present.
Chairman ABOUREZK. Is that a quorum?
Ms. DUCHENEAUX. Yes.
Chairman ABOUREZK. Ernie.
Mr. STEVENS. Max Richtman.
Mr. RICHTMAN. I just passed out the staff director's progress report to the Commissioners. It explains some of the items of Commission business items he talked about, to just briefly summarize that progress report.

We have prepared a joint resolution which is on page 2 of the progress report. The purpose of the joint resolution is to allow the Commission to submit its report, May 18, rather than February 18. The second purpose of the joint resolution is to increase the authorization of the Commission from $2,500,000 to $2,600,000.

Chairman ABOUREZK. That is an additional $100,000?

Mr. RICHTMAN. That is right.

Chairman ABOUREZK. Would you explain to the Commission why that is needed.

Mr. RICHTMAN. There are two reasons we have done that. We have prepared a budget which is attached to this progress report. The Commission requested that the staff undertake certain commitments, one of them was to distribute, to print, and to distribute the first draft of the Commission report and send it out for comment.

The extent of that, and the expense of that, is included in this additional request. The expense of retaining staff for another 2 to 3 months, to receive those comments and incorporate them in the final report, is included in that request.

And an additional amount, to fulfill commitments that various task forces made to consultants is included in that request. Those three items basically account for the additional authorization that we are requesting.

The joint resolution has been sent to Senator Abourezk's office, and we think that that will be filed in the Senate this coming week.

Chairman ABOUREZK. Is anybody going to introduce that in the House?

Mr. RICHTMAN. It will be referred to the House once it passes the Senate. I don't think we have to have anything sent over there. We have been talking to the legislative counsels in the Senate and the House, and apparently nobody has to introduce it there.

It is referred once it is passed.

Chairman ABOUREZK. I would like to direct the staff to give a copy to Congressman Meeds and Congressman Udall, to let them know

what we are doing so they will be expecting the bill. We expect to get it out in a big hurry.

We said at the outset we did not want to extend the life of the Commission. We did not want to ask for any more money. We have found ourselves kind of boxed in, in that we came down to the point where we were obligated to send out the first draft to the tribes for comment, and we had to allow them extra time. That is something we did not foresee at the beginning.

Mr. RICHTMAN. That was not taken into account in the budget that we prepared.

Chairman ABOUREZK. Or the operational schedule.

Mr. RICHTMAN. That is right.

Chairman ABOUREZK. So we found it rather necessary. I am willing to ask for that additional money even though I told everybody I wouldn't ask for more. But is this everything that will be needed, and I won't have to go back a second time because I don't really want to?

Mr. RICHTMAN. When we met last week we went over the budget that had been developed, and that is more than we need. The reason we increased it to an amount that is more than we actually need is that if something else would come up we could ask for an additional appropriation without amending the legislation further.

You are right, we had said we were not going to ask for the life of the Commission to be extended, and that is not being done under this amendment.

Commissioner DIAL. Max, will this take care of all the bills for the task forces?

Mr. RICHTMAN. Absolutely. Just for the record, the budget that we have prepared amounts to a request of $67,972, and the $100,000 authorization will allow us some leeway there.

We have about seven or eight debts that would have to appear.

Commissioner DIAL. Thank you.

Commissioner WHITECROW. Max, on the hearing expenses: Are those sufficient number of meetings that is anticipated between now and the submission date?

Mr. RICHTMAN. That should cover all the costs of transcripts. That is the only cost that we have.

Chairman ABOUREZK. I have another question, Max.

Are there any outstanding bills that have yet to be presented by task force members or Commission members for travel expenses that should be taken into consideration? In other words, have we got all our bills paid? We don't owe money to anybody?

Mr. RICHTMAN. This budget includes everybody that hasn't been paid at this time.

Chairman ABOUREZK. There are going to be no surprises?

Mr. RICHTMAN. I would be surprised if there are any.

Mr. YATES. Mr. Chairman, I would like to concur in what you said about the extension, because I made representations to the Appropriations Committee that the last additional amount to the original Commission budget was to be the last payment, and I would hope that this is it.

I dislike very much having to go back to tell my colleagues on the Appropriations Committee that we need more money to finish this work. I am willing to do it but I would hope that we don't have to do it

again. And I wonder whether or not you are not going to have to do it again.

What happens after we have marked up our report and come to some kind of an agreement as to what the report shall contain, and the report is sent throughout the country to the various tribes and organizations for their consideration?

They send their criticisms and their comments back and the Commission then considers these and comes to some decision.

Will we then have a new report to send out to the rest of the country? Is that it? Will this be finished?

Mr. RICHTMAN. The Commission decided to send out the first draft for comment, and as things stand right now that is the only draft that will go out for comment.

Mr. YATES. What I am asking: Is there an end in sight? Can we agree that we ought to just cut off at some point and amend our own decision and say this is it?

Chairman ABOUREZK. That would be preferable if we can do that.

Let me ask the Commission and the staff to comment on this: So far as getting Indian tribal comment on what we are doing here, is sending out the first draft enough? Is somebody going to demand that we send out the final draft?

Mr. STEVENS. No. Mr. Chairman, first of all, very briefly, one of the points on the appropriation we missed is that our needs come to $67,000 and not $100,000, but $100,000 is adequate in any case. The first draft represents something substantially more than a first draft.

It is going to be the result of our third, fourth, and fifth meetings, and an editorial rewrite of the comments of the next meeting. It is a little more than a first draft.

Mr. YATES. Why don't you call it a tentative report, then, rather than a first draft, something that has an air of finality about it?

Mr. STEVENS. Yes, sir, because it really is that. If you recall one of the things that was requested by Congressman Meeds at the last meeting, and also accounts for some of the expenses that we were asked to categorize—the input from the various tribal organizations, States and other groups—and append that to the report. I have talked with the various tribal groups and they are more than delighted to have the opportunity to comment.

They had not anticipated commenting, and they realize that the report will be finalized immediately afterward. I don't believe that they will request to look at it further, and we plan on finishing, if we can, no later than April 18.

So we don't anticipate anything further. As you say, sir, we could call it something else because it really is more than a first draft.

Commissioner BORBRIDGE. Mr. Chairman, as a follow up on that, what I assume we would do when we send this preliminary final report, would be to advise all of the recipients of the precise methodology so that they know what the status of that report is, to what extent and how their comments are going to be incorporated into the report, or at least considered.

Is that correct?

Mr. STEVENS. Yes. Andy Anderson has been assigned and he is working on it now. We are not just going to distribute the report. We

are going to ask certain questions, and even suggest ways, that they can specifically respond and be most effective.

And when it comes back it will be, hopefully, in a kind of format so that it can be organized and categorized the way it is supposed to be.

Chairman ABOUREZK. This means then that no matter what happens this is all we are going to ask for. There is going to have to be some element of finality.

Mr. RICHTMAN. Once this amendment is signed into law we have to submit the report by May 18. That is the law. It would dictate that so there is no extension beyond that, unless we go through the process of amending the legislation again.

Chairman ABOUREZK. You have saved enough back for printing enough copies to get around the country?

Mr. RICHTMAN. Yes.

Chairman ABOUREZK. To the Congress, the press, and so on. How many copies have you printed?

Mr. RICHTMAN. We are right now talking about 1,000 copies of the draft.

Chairman ABOUREZK. How about the final report?

Mr. RICHTMAN. The Government Printing Office allows us 1,000 copies to be sent to our office when they are printed.

Chairman ABOUREZK. Free.

Mr. RICHTMAN. Free, and 1,000 copies that they print free for us for sale to the public. If it seems that they are in great demand they will print another 1,000. To allow us any additional copies would require action by the Joint Committee on Printing.

Chairman ABOUREZK. Can we buy additional copies?

Mr. RICHTMAN. Yes; anyone can buy additional copies.

Chairman ABOUREZK. How much will they be, do you know?

Mr. RICHTMAN. They vary. The task force reports are also for sale by the Government Printing Office.

Chairman ABOUREZK. What will the final report cost per copy?

Mr. RICHTMAN. I don't know; it depends on the size of the report. The task force reports have varying prices. I think $1.25 to $2.50; about a penny a page.

Chairman ABOUREZK. I am just trying to think ahead. We are going to have to have 535 for Members of Congress, we are going to have to distribute freely throughout the administration. We are going to have to have, I would say, 300 or 400 copies for the press, maybe more.

You are going to have to have copies for law schools.

Mr. ALEXANDER. You need 20,000 copies.

Mr. RICHTMAN. I forgot to mention that in addition to those 2,000 that are printed, enough will be printed to send to the depository libraries—which are all the major libraries in the world.

Chairman ABOUREZK. How many is that?

Mr. RICHTMAN. I was told that all the major libraries in the world, university and public libraries, will get copies.

Chairman ABOUREZK. Have you taken all that into consideration?

Mr. RICHTMAN. Yes; that is not in our costs.

Chairman ABOUREZK. All right, go ahead with the report then. I think that is all the questions on that.

Mr. RICHTMAN. The other item that we want to mention involves the printing and distribution of the task force reports—which is what we have on hand now. Six of the eleven task force reports, plus the BIA management study and the Alaska special study has been printed and are now in the process of being distributed.

The staff has prepared a different mailing list for each task force report, and we forwarded that mailing list to the Senate computer room and they have computerized the whole process, and produced labels for us which we now have.

They were delivered on Tuesday, and the staff is now putting them in envelopes, attaching the labels, and mailing them. We will have sent out all the reports that we have on hand now by the 15th of January. As the rest of these reports come into our office, 2 or 3 days after they arrive they will be mailed, since we have all of the labels now and all of the envelopes ready to go.

Mr. YATES. Mr. Chairman, why can't we finish by the 18th our legislative deadline?

Chairman ABOUREZK. The 18th of what month?

Mr. YATES. Why can't we finish by our deadline?

Mr. RICHTMAN. By February 18?

Mr. YATES. Right.

Mr. RICHTMAN. If we follow the Commission's instruction to send the first draft of the report for comment, and allow a 30-day comment period and then take those comments and incorporate them in the final report, there wouldn't be enough time to do that by February 18.

Mr. YATES. Why don't we give them 2 weeks instead of 30 days and then finish up?

Mr. RICHTMAN. I am not sure that would be a realistic time frame for meaningful input.

Mr. STEVENS. The method we have used is one similar to how the regulations are published. What we are using is a postmarked date system. A number of tribes are going to act on them and we have told them in advance that it is coming, approximately, the first part of February. Sometimes they have to have a council meeting if they want to take an action.

Mr. YATES. What are you going to do if they disapprove?

Mr. STEVENS. We will disregard it. I suspect they won't.

Mr. YATES. I think it looks very interesting.

Chairman ABOUREZK. All right, go ahead.

Are you ready to begin on the report?

Mr. STEVENS. I have one other item, Senator, before you do that.

Chairman ABOUREZK. All right.

Mr. STEVENS. The Commission, at the last meeting, instructed the staff to do several things related to transition type of activities. I was waiting for the Democratic caucus, and I have sent a letter, which I will distribute and give to the Commission.

Of course events have changed since then; however, I complied with the motion that was passed requesting, on behalf of the Commission, an Indian committee in both Houses of Congress. No other things have happened since then, but I have complied with the motion and I will distribute the letter I sent later on.

The chairman asked me to get together with the Carter administration—and I have attempted to do that in a number of ways—in

relation to the BIA management study. I have met with various people in the President's transition team on the Interior Department transition. We have given them not only the BIA management study, but also a summary of how such a study could be implemented immediately.

The problem that I see in Indian administration is that everybody always wants to conduct a study, and we are pressing the point, we need not do that. We have done that.

I have told them there are 75 studies of the BIA management study, and the 76th, which is ours, has substantially summarized it, among other things, and we need not go through a kind of 77 kind. And we gave them an optional or an example of an action plan that they could implement immediately if they wish.

Certain provisions in the BIA management study are noncontroversial as far as I know among the Indian people, including the right of the Indian people to deal directly with the Commissioner and/or the Assistant Secretary in the budget process. We have done that at your instruction.

I have distributed copies of that summary but we need to go over it.

Commissioner WHITECROW. Mr. Chairman, I would like to go back just a moment to Congressman Yates' comment and question in regard to what are we going to do if a tribe opposes the report that is submitted. It is a very pertinent point that we need to consider before we proceed.

One of the reasons that we really urge the action of this Commission, to allow tribes the opportunity of commenting, is so that we could get their response and have their response heard and incorporated into our Commission report.

I think in this particular regard, those comments that are returned in regard to our Commission report should be taken and studied by our staff, and the consensus of those opinions should be written in our report.

Chairman ABOUREZK. I think the staff understands that.

Mr. STEVENS. Yes, sir.

Chairman ABOUREZK. Otherwise it would be a futile effort to send out the reports for comment.

Mr. STEVENS. That is why it is going to be appended at the end of the report. They will be able to see the input within the thing.

Commissioner WHITECROW. Otherwise we are just shooting into the wind here if we are not careful, going for the extra time.

Mr. YATES. What happens if you get a reply from many tribes that is extensive? What does this do to your publication costs if you are going to include their comments, and their summaries as part of our report?

Chairman ABOUREZK. May I respond to that?

Mr. YATES. Surely.

Chairman ABOUREZK. Let's take one recommendation of the report. Just as an example, I don't know what it might be, say that they recommend that the BIA be reorganized.

If that recommendation receives a great deal of adverse comment by the tribes, we would, I think, be obligated to change it, if there is a consensus among the tribes.

Mr. YATES. You mean if there is a consensus to keep the BIA as part of the Department of the Interior?

Chairman ABOUREZK. Yes, whatever recommendation might take place.

We are doing this for the purpose of finding out what the tribes themselves want.

Mr. YATES. I don't understand that. Perhaps I misunderstood what you said, but it seems to me that what we are asked to do is give our own opinions as to what changes, if any, should be made. If the Commission believes, regardless of what the tribes think, that there ought to be a change in the structure of the BIA, and a separation from the Department of the Interior, I think we have an obligation to recommend that.

Including, of course, the recommendation of the tribes to retain it too.

Chairman ABOUREZK. It would just seem to me that a final draft of this report should include that policy for the Indian people be established by the Indian people.

Now, obviously there is going to be disagreement on a lot of things. If there is just a few tribes that object to something we recommend, I don't foresee us changing it a great deal, unless we are convinced by that objection.

Mr. YATES. What is the function of the Commission then, merely to gather the thinking of the Indian people?

Chairman ABOUREZK. Yes, really, in a manner of speaking. I thought it was.

Mr. YATES. I didn't conceive that to be the function of the Commission. I thought it was the function of the Commission to get all the facts that we could and go over them, and then conclude individually and as a group as to what we think the best recommendations should be.

Chairman ABOUREZK. Let me state it a different way—I think we can settle it very quickly once we get the comment of the tribes—the Commission will have to vote on that final Commission draft anyway. We will take that into consideration as we vote. We may agree or disagree with what they say.

Commissioner DIAL. Mr. Chairman, I believe the Congressman is correct. The important point is when the reports come in from the tribes, if the staff incorporates the reports from the tribes to the final draft, and we haven't said anything then what we are doing really, is approving what you have done on your own without having any input on it at all.

Why couldn't you mail out a summary of the new findings to the Commission and maybe we will have something to say—by telephone or by some way or come up here, or something before this goes into a final report—and save a whole lot of trouble of rewriting the entire report?

What you are doing, when the new comment from the tribes come in, is put them into the final draft. We have them and we go ahead, and say that's fine, or if we don't then you have a lot of trouble.

Mr. YATES. But Adolph, we are in trouble. I was under the impression that our task forces had gone all over the country, and obtained the views of the tribes on all these issues that were under considera-

tion and then the task forces were presenting to us the views of the tribes.

Chairman ABOUREZK. They did.

Mr. YATES. All right, then why are we suddenly faced with having to go back to the tribes and getting the tribes' viewpoint?

Commissioner DIAL. My answer to that, Congressman Yates, is that we aren't going to have too many new views from the tribes on this report. So I don't see anything coming in like this unless it is already in the report as it stands after the meeting in the first week of February. Maybe just a few pages.

Chairman ABOUREZK. If I could respond to that. I don't expect that we are going to have any adverse comments from the tribes since what we are recommending, by and large, is what the tribes recommended to the task force. During our considerations for this final report I expect that there will be one or two places where the Commission will change and vote down what the task forces have presented to us.

We had some controversy in the last meeting on a couple of points. Congressman Meeds will be here to talk more about them later today.

But if we vote down some of the recommendations that have been made by the task forces, I would expect the tribes might come back and say: "Well, we stand with our original position." Then we will have a chance to vote once again on that.

In other words, it is going to be a democratic process, I think, no matter what happens. That what comes out will be the Commission product tempered by the input of the tribes.

Mr. YATES. Isn't that a function of our staff, then, to show how the Commission differs from the tribes. If it does differ from the tribes?

Commissioner BRUCE. Yes; it is a function of the staff. Also there is a political problem involved as well, Sid. We decided to send out the tentative draft to the tribes because we wanted to make certain that there is no area of criticism that can be leveled at the Commission for not taking into account Indian opinion.

Mr. YATES. Now it seems to me you are on two sides of the coin on this, Jim. You have just alluded to the possibility of the Commission voting down a recommendation of the task force which presumably comes out of the tribe's opinion. Yet you previously said that if the tribes wanted to continue the BIA, for example, in the same structure it has, you thought it incumbent upon the Commission to accept that.

Chairman ABOUREZK. I mean each Commissioner will have the right to vote on that. Nobody is forced to do anything. You have the right to vote on it. But everything we do will be tempered by what the tribes are saying.

Commissioner DEER. Mr. Chairman, I just wanted to follow through on the earlier comment about consultation. It has been our philosophy here to consult as much as possible with the Indian tribes and the groups and people across the country. And due to the suit that was brought against us, there was some misunderstanding, confusion, reluctance on the part of a number of Indian groups to participate. Then as we went to the task force hearing processes and we went to the meetings, then that was resolved. And this is my

opinion. People really began to understand what we were all about. It has taken time for people to obtain this insight, and to finalize and circulate the final draft before it is published, I think, is consistent with it. Even though they had input into the task force process, there was no comprehensive report available to everybody at that time and people wanted to know ahead of time what some of these possible recommendations would be.

This is part of the continuing process because the Indian people themselves are going to have to then take action to bring about some of these recommendations. So it is again part of this whole educational and consulting process with the Indian people.

Mr. YATES. Well, two things to that, Ada. Of course, the Indian people are going to determine what finally should be done. In my experience with the Indian people, and of course it doesn't match those of other Commissioners, it seems to me they are always in agreement on each of the points. And this assumes that they will be in agreement on certain things.

I wouldn't think that there wouldn't be agreement on many of these points that are observed. Second, Max just handed me the rules of the Commission, or the procedures the Commission is to follow.

Section 5(a) says "upon the report of the task forces made pursuant to the law the Commission shall review and compile such reports, together with its independent findings, into a final report." Presumably, we are supposed to act upon the work of the task forces themselves.

According to the rules I think we are going to have additional recommendations and additional criticism. I don't think there is any question about that, and sometime we are just going to have to take a vote on the things as to whether we agree with the tribes or not.

After that we are going to have to recommend to the Congress what we think should be done and at such time as legislation is presented, based upon our recommendations, the tribes will be able to present their input as well.

Chairman ABOUREZK. I think we are arguing about nothing, because I think eventually we agree on what is going to happen.

Mr. YATES. That is right. In any event, the tribes are going to be able to make their presentation at some point along the line—whether they do it in connection with our report or subsequently. Of course, our report will have some kind of status we assume, for all the work that has been poured into it. But the opinions of the tribes will always be able to be presented.

Mr. STEVENS. Mr. Chairman, a couple of things that came up I think I clarified. First of all, in reference to Commissioner Dial's questions, after the input is received and consolidated the Commission will receive an updated draft on the basis of their previous meeting, or a proposed change. They will then meet and go over those changes.

Commissioner DIAL. This is what I was saying. Would you mail a summary of the input from the tribes?

Mr. STEVENS. Yes, sir.

Commissioner DIAL. And then we meet?

Mr. STEVENS. Yes, sir, and we will then make recommended changes.

Commissioner DIAL. We won't come up here in the dark?

Mr. STEVENS. No, sir. If you will look on the progress report, you will see the schedule the rest of the way. We have the thing arranged ahead of time. I don't see blanket rejections or acceptance of the report. I don't think that is going to happen. I have seen it happen in the past. But if you went to the Utah convention the resolutions and everything are very specific. The mood of the Indian people and Indian tribes in reference to this Commission and our proposed activities is changing rapidly.

One of the reasons for it is they now, I believe, are convinced that we mean business and that Congress is going to do something with the report we are submitting. When they get an opportunity to read the draft, everybody I talked to is just delighted. They could not believe it. They are never given a chance to look at a draft, and we are giving it to them and they are really pleased.

I believe that every tribe and the major organizations will go to specific issues. What's more, one of the practical things they could help us with is we have found errors in our text that dealt with one thing or another, and they can mechanically help us, and will do that.

I do not see a deviation between the Commission and the feelings of the Indian tribes. I think there may be some slight deviations. I don't know. But I think they will be fine line. I think what we are going to come up with is something that is pretty well supported by the Indian people. And I think that speaks for the passage of the legislation that might follow.

Chairman ABOUREZK. If the Commission has no objection, I think we ought to move on and start in on the report. I think we have pretty well exhausted this area.

Do you have anything else you want to bring up on any other issue, Ernie?

Mr. STEVENS. No, sir.

Chairman ABOUREZK. All right. Now we will start with the prolog. I would like to say about the prolog that I would like to see a redraft of it and made much shorter. I am in the process of making a draft of my own which I will submit to the Commission at our next meeting. I haven't finished it yet, but I would like to do that, if that is possible.

Mr. YATES. OK. What is the next item?

Chairman ABOUREZK. That took care of that.

The next item is the introduction. Does anybody have any comments about the introduction?

Mr. YATES. I think it is pretty good.

Mr. STEVENS. Paul has to add something on the introduction.

Chairman ABOUREZK. All right. Let me first ask the Commission if they have any remarks or comments about the introduction one way or the other?

I think it is pretty straightforward.

Mr. YATES. It is a good, forthright statement of what has occurred.

Chairman ABOUREZK. Let me go back just to the prolog just for 1 second. What I think the p[illegible] needs to state, or you can call it whatever you want—preface—[illegible] lay a very brief framework for what we see as coming out as recommendations of your work, and that is an argument for Indian sovereignty. My concept of it is that the question should be asked: Is the United States secure enough

in itself and mature enough to be able to tolerate and encourage, in fact, a subsociety of aboriginal peoples within the major, dominant society? Or, are we going to be insecure and immature enough to say that, no; we can't tolerate that, we are going to have to conform them to our society and make them look like us and live like us and act like us?

Now that, to me, seems to be the entire question. Now that is the way that I am drafting my restatement of the prolog. If anybody would like to add to that or subtract——

Mr. YATES. It sounds more like a summary than a prolog.

Commissioner BRUCE. Yes.

Mr. YATES. That is your conclusion, really, as to what the recommendations are.

Chairman ABOUREZK. It is more or less a framework.

Mr. YATES. Why do you need a prolog? Why aren't you moving from your introduction into a very businesslike approach?

Chairman ABOUREZK. Well, it is kind of stating a reason for this Commission and for the report. The introduction lays out what the process was and how we got here.

Mr. YATES. I see.

Commissioner BRUCE. Will we see a copy?

Chairman ABOUREZK. Certainly. You will have a chance to amend it, or vote it down, or whatever. Absolutely.

Mr. YATES. Will it go out to the tribes?

Chairman ABOUREZK. We had better not send that one out.

Mr. STEVENS. Mr. Chairman, on that, there the one thing that I find, and I think it has to be sharpened quite a bit, but the thing that people don't understand and part of that being has got to be if people don't understand why Indians are supposed to be separate, then there isn't any sense in reading the report. That is why there is a prolog.

If they don't understand why Indian people have a right to be separate and if they are not willing to concede it: Why waste the time? And that is why it is the prolog, and that kind of note has to be in there.

Chairman ABOUREZK. I read an article a few days ago in the New York Times that said that separatist movements are turning up everywhere in the world—expecially in Africa, and even in the United States with the American Indians. I think one thing we are going to have to do somewhere here is dispel the notion that this is really a separatist movement—that the Indian tribes are trying to move away from the United States which is what a separatist movement really is. It doesn't seem to me that is what the objective is of the Indian tribes. What it is: It is maintaining a distinct culture but somehow depending upon the United States for the conduct of its external affairs.

Commissioner BORBRIDGE. Mr. Chairman, I would hope in the draft which you are proposing that you will address yourself to the question: Is the United States mature enough to tolerate the separate subsociety? Perhaps that might be point two.

Point one conceivably might be: In light of the law and in light of all of the reports we have had by our various legal counsels which clearly establishes the basis for the sovereignty of the Indian tribes

in the United States, it would appear that the question of whether or not they are sovereign and whether or not there is a clear right to this sovereignty, with all of the attendant characteristics of sovereignty, is pretty well established. Perhaps the second question then is whether the United States is willing to recognize this very solemn obligation which goes perhaps to the integrity of the system which is willing to recognize what obligation that it ought to recognize.

Chairman ABOUREZK. Good point.

Mr. STEVENS. People have to understand history. I talked to the White House about a special assistant for Indians and they referred to as a special interest group. My reply to that was that I recommend that the White House only have offices for special interest groups that are recognized in the Constitution. People just don't understand that, and they have got to. Otherwise, we are always being dealt with as a minority or a special interest group and we are not. We are a people with a special legal status. Anybody who is in a bad way in this country has a right to the kind of things that I think the United States is giving to its citizens. But we don't want to be recognized on that basis. We want our legal rights. I don't want somebody to give me something out of their largesse. I want the special recognition as an Indian person or for our tribe and I want them to live up to their agreements.

If people don't even understand that those agreements exist, there isn't any sense in even establishing the Indian question. That has to be in the prolog. And if they don't understand it, there is no sense in their going into the rest of the chapters.

Chairman ABOUREZK. That is another good point.

Commissioner DEER. Mr. Chairman, I think this may be in the last paragraph——

Mr. YATES. Paragraph of what, Ada?

Commissioner DEER. The introduction.

I don't think, at least in my opinion, there is a clear delineation of the issues that were not covered in the task force reports. I am not saying that this necessarily would have to be here, but somewhere in our report there should be at least a listing of the issues that were not covered because I think that some of the task forces did not address certain issues, and this is an important fact to be known.

Mr. ALEXANDER. That last paragraph is going to be expanded when the full report is in a state when we can with specificity say what is not being covered. Even though the task forces did not cover certain points, some of our staff is trying to cover that territory. So until we finish the report in a final draft form we can't finish that last paragraph.

That is just an indication in the introduction as to what it would be. It will be fairly specific and the details may be footnoted, but it will indicate what the gaps are. You have to do that. You can't let the reader assume that this is the end-all and the be-all report on Indian affairs. There are going to be limitations to this report, clearly.

The one other point that came out of the discussion yesterday that we think needed to be added to the introduction, and we will do that, is that there is some confusion about the form of our recommendations because we do not, in the draft that we are providing, write legislation. We suggest legislation should be enacted to accomplish specific things, that it should follow certain policy points and so on, but we do not

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provide legislative language. We do not provide draft legislation and the nature of the recommendation should also be spelled out in the introduction as to what they are.

So, to avoid confusion—and we have gotten some confusion on that—I will do that.

Chairman ABOUREZK. What will the executive summary contain? What is that supposed to be?

Mr. ALEXANDER. The executive summary, when the entire report is written, will be a fairly tight piece that gives the reader what the main themes of the report are and what the major recommendations of the report are. It will be the one place in the report that you can turn to and briefly know what this report is all about and what its major policy thrusts are.

Chairman ABOUREZK. Why do you call it executive?

Mr. ALEXANDER. It is just a term of art. It is the one used in the BIA management study. It could be called a lot of other things.

Chairman ABOUREZK. How about legislative summary?

Mr. ALEXANDER. We could call it a policy statement.

Chairman ABOUREZK. It is not really that big a thing but, maybe, just summary would be fine.

All right. The history of Indian/U.S. relations, we have already reviewed and I think we have pretty much approved that. Does anybody have anything else to say on that? I thought it was a well-written piece and I am very glad we had D'Arcy here to do it.

Mr. YATES. Which one is that?

Chairman ABOUREZK. It is not in here now. We distributed it before. Would one of the staff give Sid a copy of D'Arcy McNickle's study in case he doesn't have one?

Mr. ALEXANDER. It is in the November book in full.

Chairman ABOUREZK. All right. Legal concepts and Indian law.

Commissioner WHITECROW. Mr. Chairman, I would like to go back, if I may, to this prolog for just a moment and make some comments with regard to the prolog and the introduction. The prolog is quite lengthy. I think it needs to be very pointedly brought out in the prolog the fact that this is one of the first actual studies that has ever been done by the Congress of the United States in the relationship with the American Indian tribes.

D'Arcy McNickle says on page 14 of the prolog:

> It is quite tricky work sometimes, and oftentimes it is obliterating, wiping out what was there before and making over people into a new cultural background, a new set of beliefs and customs. Assimilation need not mean that.
>
> It should mean that the right of a people to change over time, selecting what they want to adopt, rejecting what they cannot live with to the conflict of their beliefs, to their system of values. But if allowed to select and choose and adopt, the people will change. People do change.

I would like to see this prolog maintain that kind of an attitude, so that a person just picking this up—a history professor, a history teacher in a high school, an individual Indian out here in the field, or an individual non-Indian—begins to understand that within the limits of our United States we can have many different cultures simultaneously living together and that all cultures should be allowed to exist and continue into the future.

I like the last page on this prolog, page 15, where it is compended: If we are to renew our covenant with God as stated in the Declaration

of Independence, if we are to make a lasting imprint on history as a truly great and moral Nation, we must begin the revival of our national conscience.

We cannot legislate away racism and class hatred. However, we can remove at last by declaration and legislation the obstacles which have been placed in the way of final freedom for the American Indians.

As this Nation passes from a time of crisis and moves into the third century, there is a theme, there is a fundamental question confronting all Americans: Can America endure as a free society if it allows its first inhabitants to smother, die and pass out of existence.

I would like to see that prolog maintain that attitude all the way through.

Chairman ABOUREZK. I think it will. Maybe not in those exact words. But one thing I would appreciate if you, or anybody, would write down some of the ideas you think ought to go into the prolog then I will try to incorporate them in the draft. If you are not satisfied with it, we can try to change that.

Mr. YATES. I would rather wait and criticize yours.

Chairman ABOUREZK. I know.

Mr. YATES. May I make one comment? I know you want to go along and I should let you alone. I think Jake's first point is a bad one, if I may say so with respect, Jake. It overrules Ernie's concept which I thought was a good one, and that was to show that the Indian people are different from other minorities. When you talk about the United States existing as an amalgam of all the cultures, I think the Indian people would get lost in that.

I would rather see the Indian people not talk about all the cultures that have been brought here by the peoples of the world, but rather let's concentrate on the Indian people and their constitutional rights to have some kind of special consideration.

Commissioner WHITECROW. I didn't mean to imply that we didn't want to maintain our culture.

Mr. YATES. I know you would never imply or say that in any respect.

Commissioner WHITECROW. Very definitely. The Indian people do want to maintain separatism but, however, I do not feel that the Indian people want to be anti-United States of America. I think their loyalty is totally with the United States of America and we do not intend to separate or divide.

Mr. YATES. That wasn't in my comment at all.

Chairman ABOUREZK. I know it isn't. But I think that is the difference in what is known as a separatist movement and what is known as a sovereignty. There is a great distinction.

Mr. YATES. Thank you, Mr. Chairman.

Chairman ABOUREZK. OK. Back on concepts and Indian law. In my reading of this section, I think it is good. I wonder if it needs to be that long? Charlie, you did this section?

Mr. WILKINSON. Yes.

Chairman ABOUREZK. I wonder if it needs to be this long. I don't think there is anything wrong with a good exposition of the conceptual thinking on Indian law. Is there anyway you can think of that it could be shortened without omitting anything major?

Mr. WILKINSON. Indian law is a big body of law, as you well know. What I want to do with this section, and we have talked a lot about this question, my understanding from the people we have talked to—and I talked with several Commissioners about it, also—is that perhaps there should be some minor editing. In other words, this is a fifth or sixth draft. At one point it was 80 pages, and then 70, and then down to 40. I want to turn it over so someone else for editing, if it need be, but I have serious question as to whether the length can be cut down substantially.

I want to emphasize that that is not a pride of authorship point but I personally think that would be difficult.

Chairman ABOUREZK. All right. Any other comments on this section?

Mr. YATES. Mr. Chairman, I thought it was a very well stated treatise and a very important one. I must say in all honesty and frankness that I had read an opinion by Reed Chambers to the Secretary of the Interior on his responsibility to the Indians and it brought to me, really, the first real insight as to what the rights of the Indian people are under the Constitution and under the Supreme Court decisions.

Mr. Wilkinson amplifies very well on Mr. Chambers' statement. I like particularly the statement that appears—oh, these aren't numbered.

Mr. WILKINSON. You might refer to the footnote on the page. In other words, the text accompanying footnote 7.

Mr. YATES. Oh, yes. Footnotes beginning on page 9—footnotes 9, 10 and 12, where you say:

> Thus, today the Supreme Court"—I would like to see "today" stricken. I know there has been change in the attitude of the Supreme Court but I would just as soon say, thus the Supreme Court of the United States has made it clear, rather than today's Supreme Court has made it clear that tribal sovereignty * * *.

Complete sovereignty has been slightly eroded and at least in my view there does not exist complete sovereignty. I don't know any government that has complete sovereignty, really.

I think, perhaps, that if Lloyd Meeds were here, this is where I would find myself in difference with him. He thinks of sovereignty as being absolute and complete, I think, as used in this definition, it is a limited sovereignty that the Indian tribes have—very much as the States and counties have. Other governmental institutions may have that kind of limited sovereignty.

Mr. WILKINSON. I have heard Congressman Meeds refer to two different metaphors. He has referred to the sticks and the bundle notion of sovereignty in which I believe. He has also suggested that it is like being pregnant and you can't be a little bit pregnant. I think it is the sticks and the bundle.

Mr. YATES. No; that is a different concept, and I may say a different procedure. But I thought the statement that appears on this page is a very good delineation of the concept. I must say that I enjoyed reading it so much that I would hate very much to see it cut down.

I would think that most American people are not aware of the rights of the Indian people. I think that you have to have in this report an enlightening and interesting presentation of how we come to the con-

clusion that we agree with the Supreme Court of the United States that the Indian people have certain rights that most Americans don't envision.

And so I, for one, would like to compliment the author of this treatise and say that I think he has done a very good job.

Commissioner BRUCE. Mr. Chairman, I would hate to see us cut any part of this. When we talk about sovereignty I would like to have anyone come to the Congress or the Senate and ask them how they feel about sovereignty and see what the answer is. I know what it will be, but it means that there is a lack of understanding of the historical background.

And I think in the first sentence there Charlie, "The relationship between the United States and the American Indian tribes is unique and special." I think that is the key. While some of this is duplicated in the prolog and also in the introduction, I would hate to see us eliminate any part of it.

I don't know how many pages there is here, but, 500 pages to go into all the cases and so forth and you condensed it. I think it ought to stay.

Mr. YATES. Mr. Chairman, may I just read one paragraph from Mr. Chambers' statement. He said to the Secretary:

> The underlying purpose of the trust relationship, in my opinion, is to honor that Federal guarantee of self-government and the promise of the early treaties that the Indian retained lands could be the base for a separate culture and polity and disregard the strict property-related fiduciary standards for a means toward the end of guaranteeing for Indians a viable option to exist as a rural, land-based society. For if a tribal government and culture are to exist they must have some secure land-base to function upon and govern, water to irrigate the land, fish and game in the streams, timber and mineral development.

In this sense the self-determination theme in President Nixon's 1970 message to Congress, and I think he used that, is not inconsistent with the trust relationship. Indeed it is fully compatible with its ancient purposes. The trust responsibility may limit itself to termination but in a federal system no entity has absolute self-determination. All political institutions function amidst checks and balances and are subject to limitation under sovereign power; which I thought was a good statement.

Commissioner DEER. Mr. Chairman, I would like to say I concur wholeheartedly with the Congressman and with Commissioner Bruce. I also find it difficult to cut this, because it is my experience also that it is difficult to summarize these concepts and people do learn by some repetition.

Mr. WILKINSON. It is an honor to be complimented by a Congressman and a former Commissioner but there is nothing nicer than to be complimented by a former client.

Chairman ABOUREZK. Do you want that taken out of the record, Charlie?

Mr. YATES. I think we ought to leave it in the record.

Chairman ABOUREZK. All right. Does that do it for that section?

Contemporary conditions of the Indians is the next section, and my book says that a draft of this section was received from the Library of Congress is inadequate and a new draft is anticipated prior to the January Commission meeting.

Mr. ALEXANDER. It has not been completed by the Library of Congress, but when we get it and work it over it will be available to you in February.

Mr. YATES. Mr. Chairman, may I return to Mr. Wilkinson for 1 minute?

Footnote No. 26, Mr. Wilkinson, this has troubled me a great deal. It says:

> The scope of the trust responsibility extends beyond specific and real and personal property which is held in trust. The United States has an obligation to provide certain services and take other appropriate action necessary to protect tribal self-government.

What are you talking about when you talk about services? And what is the limitation upon services that you are talking about there? What is the obligation of the United States to individual Indians? What is the obligation of the United States to urban Indians? Where does the trust relationship begin and end?

Mr. WILKINSON. This material, Mr. Congressman, is taken from, I think, a historic law review article by Reed Chambers which was published in the Stanford Law Review.

Mr. YATES. Yes; I have it here.

Mr. WILKINSON. And I want to emphasize the next sentence, the sentence on footnote 28 of the text, accompanying footnote 28.

What Mr. Chambers concluded was that the trust relationship, as it was evolved and as we pointed out, it is an evolving doctrine. It is tied to the land base, is tied to self-government. Treaties for instance recognize that tribes as governments, didn't create them as governments but recognized them as governments.

Professor Chambers concluded that there is a duty to protect tribal government and he emphasized that the case law is unclear on that. That is, unclear as to exactly what that duty encompasses. And later on, and I think very soon there will be recommendations by the staff to define that duty further.

In other words, right now the case law is, I think, vague. Yes; it is. And for that very reason we believe the duty exists. We are suggesting to the Commission that it would be good to define that duty.

Mr. YATES. A duty to do what exists?

Mr. WILKINSON. To protect tribal self-government.

Mr. YATES. But my question is: is there a duty to individual Indians?

Mr. WILKINSON. That is in the next sentence and Professor Chambers concluded that the trust responsibility may include a duty to provide a level of services. In other words, I am suggesting that that is an open question. In other words, education services on the reservation is a good argument that he sets forth. That the trust responsibility does include an obligation to the reservation and that is to provide service of general or equal to the State. However, he believes the law is inconclusive, and I agree with him, and that is why I used the phrase may. There is no suggestion in his article that this would extend to urban Indians the duty to provide services roughly equal to those provided.

Mr. YATES. He would draw a parallel between, say, the relationship between the Federal Government and the individual citizens of a State insofar as the benefits of Federal services flow through. They flow through the State ordinarily other than directly to the person.

Now is your concept the same with respect to tribal self-government in its relationship with the Federal Government? Will the tribes

presumably receive the benefits from the Federal Government and be responsible for taking care of their individual members either on the reservations or wherever they may be?

Mr. WILKINSON. As I understood your statement I agree with it except that for wherever they may be. Now we indicate here that the trust responsibility does follow an Indian wherever he or she may be. But that doesn't necessarily include the duty to provide services. It includes, for example, Ernie Stevens is in Washington, D.C. There is a duty owing to him to recognize him as a citizen of his tribe, to protect his land in Wisconsin, but there may not be a duty to provide services. We are not suggesting that.

Mr. YATES. Well, let's take the case of Ernie Stevens. Here he is a resident of the District of Columbia. As of what point is he no longer a member of his tribe?

Mr. WILKINSON. I believe he is still a member of his tribe.

Mr. YATES. I know. But at what point is an individual Indian no longer a member of the tribe? He comes to New York, or comes to San Francisco. He takes a job. He no longer relates to his tribe in terms of communication in some way or another.

Mr. WILKINSON. That is answered this way, and I think it is a very important concept. A tribe has the right to determine its own membership.

Mr. YATES. The tribe itself has?

Mr. WILKINSON. Yes.

Mr. YATES. And the point at which the member is no longer a member of the tribe?

Mr. WILKINSON. That is correct.

Mr. YATES. What does that do insofar as the relationship of that tribe member to the Federal Government? Now suppose Ernie Stevens is in the District of Columbia and falls on hard times. Must he look to his tribe for survival or may he go to obtain help from some Federal agency directly?

Mr. WILKINSON. The present procedure is that the BIA would provide him with some services. I think health services and not other services.

Mr. YATES. No; the Indian Health Service provides clinics in many of the cities but the BIA doesn't.

Mr. WILKINSON. Pardon me. I meant the Indian Health Service.

Mr. YATES. But then we have trouble with some of our colleagues in the Congress who want to know under what rights the Indian people are different in that respect from other Americans, from getting help and getting a separate clinic of their own.

Now if you are going to a concept of tribal self-government, at what point does it begin and end with respect to Ernie Stevens who has fallen on hard times in the District of Columbia?

Mr. STEVENS. Never. See that is the part I don't understand. Saturday I am going home to vote in a semiannual election.

Mr. YATES. No; this is another Ernie Stevens. This is an Ernie Stevens who has broken away in some way from his tribe. He doesn't go back to vote in the semiannual election. He doesn't call for help upon his tribe. His tribe has not said that he is no longer a member of his tribe.

May he apply, or must he go back to his tribe before he can apply for help from the Government?

Mr. WILKINSON. Well, if he is on the roll of the tribe, he is a tribal member.

Mr. YATES. He is a tribal member. But you haven't answered my question. My question is: Must he get his help through the tribe or can he go directly as an American citizen does to an HEW clinic and get help directly?

Mr. WILKINSON. He is an American citizen. He can go to HEW.

Mr. YATES. Then he has a dual benefit.

Mr. WILKINSON. Dual citizenship, that is right.

Mr. YATES. In other words, as a tribal member he can receive the benefits the tribe has with the Federal Government, or he can go beyond that and get help individually?

Mr. WILKINSON. Yes.

Mr. YATES. Do the tribes want that? Do the tribes want the controlling jurisdiction over their people no matter where they may be, or do they want them only on the reservation?

Chairman ABOUREZK. They couldn't have jurisdiction if he is off the reservation.

Mr. YATES. Well, he is still on the rolls and the question is now—there are so many things here that enter my mind. Upon what basis is help from the Federal Government premised to a tribe? Is the Indian members of the tribe one of the criteria? If it is, is it the number of members on the reservation, or wherever they may be?

Mr. PARKER. May I respond to that? You raise obviously a very complex question and one which has puzzled many Members of the Congress as well as the general public. But I think it is one to which there is a clear answer.

Now in my mind, there is no question that the basis for the tribal membership right comes from the Federal recognition of that tribe by the U.S. Government. Premised on that Federal recognition each member participates in the tribal right and in the Federal recognition.

Now, when an individual Indian is away from his tribal base and off the reservation, living in an urban area or whatever, he retains undiminished his membership rights in the tribe and the tribe retains undiminished jurisdiction over him insofar as he is a member of his tribe but not insofar as any other attribute that may be involved.

For example, he is concerned about health services or any other sort of governmental service but he is off the reservation. Then he is an American citizen for purposes of participating in those services and taking advantage of whatever services may be available to any other American citizen.

Mr. YATES. Does the trust responsibility of the Federal Government extend to him as an American citizen, or as an Indian-American citizen, or does the trust responsibility of the Federal Government extend only to him as a member of the tribe?

Mr. PARKER. I think it is clear that it is only to him as a member of the tribe.

Mr. YATES. Only as a member of the tribe. Well, once he leaves the reservation and comes to the city and is not on the reservation. Are you not arguing in favor of the BIA concept, that the American responsibility is only to members of the tribe on the reservation? Isn't that what you are arguing?

Mr. PARKER. No; not at all.

Chairman ABOUREZK. May I break in?

Mr. YATES. You surely may. This bears upon the professor's statement: What is the trust responsibility of the Federal Government?

Chairman ABOUREZK. That is what I want to try to delineate if I can. I think the trust responsibility of the Federal Government runs directly toward the land, the water, and the mineral resources that are owned and controlled by the tribe. When he says the trust responsibility runs directly to the tribes that recognizes that that land is controlled in a certain legal fashion by the tribes, even though you've gone through the Allotment Act. And there are some allotments that are held in trust by the Government, that the Federal Government has a trust responsibility.

Now if you have an Indian tribal member living on the reservation, then that trust responsibility runs through him to those resources. If he leaves the reservation, the trust responsibility still runs through him to those resources but now you are talking in a different area outside of the trust responsibility. You are talking about Federal services to individual U.S. citizens.

Mr. YATES. No; I am not.

Chairman ABOUREZK. Well, you were asking about them.

Mr. YATES. About both really.

Chairman ABOUREZK. I am separating the two. If that tribal member is on the reservation, Government welfare services are available to him as a member of that particular jurisdiction. If he moves to Chicago, then they are available to him as a citizen of Chicago, probably on an equal basis with the other citizens of Chicago. But he still has not lost that obligation on the part of the Federal Government to protect his trust resources back in his own reservation. He still has an interest in that land and all those resources back there.

Mr. YATES. If I understand what you are saying, the trust responsibility isn't to the individual but is to the tribe and its ownership of certain resources.

Chairman ABOUREZK. Well, it runs through the tribe and through the individuals to the land itself. The Government is charged with caring for those resources.

Mr. YATES. But not for caring for the welfare of the Indian people?

Chairman ABOUREZK. Yes: really as U.S. citizens. That is where the distinction comes in in my view.

Mr. YATES. As U.S. citizens and no different from any other citizen?

Chairman ABOUREZK. In a way that is right.

Mr. YATES. What do you mean by in a way? Yes or no?

Chairman ABOUREZK. I mean as they are different from other U.S. citizens in a way when you talk about trust responsibilities. They are no different when you talk about social responsibilities. Is that accurate or inaccurate?

Mr. ALEXANDER. That is a narrow view and is not the view we have taken.

Chairman ABOUREZK. What is your view then?

Mr. ALEXANDER. We have discussed this before, and this report discusses it also. There are two levels in a sense of the trust authorization. The prime trust authorization and obligation to the tribe and

then down through the tribal citizen members is an obligation to protect that tribal government and to protect the lands of that tribe. The secondary component which may be variable depending on circumstances is an obligation because of the dependency status to provide those social services that are necessary in that tribal context.

Now when we get off reservation you almost have to break it down by a particular type of social service that is being discussed. We used the example previously of certain educational services, like scholarship aid which is a thing to the tribe in a sense to upgrade the educational and the managerial skills to run the reservation, if you would like to put it in that context. That could be administered by the tribe regardless of where the individual person is. And in a purely pragmatic sense it is difficult for any tribe to manage job training programs in the Chicago setting.

Chairman ABOUREZK. Let me break in. But that is a social service given by the Federal Government to that tribe. It could be given to a separate State. They could make the same thing for South Dakota or Illinois couldn't they? I mean they don't, but they could. So, therefore, you are talking about a social responsibility given to a certain jurisdiction within the United States. The jurisdiction happens to be the tribe.

Mr. ALEXANDER. Yes. But there is a difference in the U.S. Government extending a variety of social service support systems. The States and local jurisdictions are under the social obligations it has with respect to Indian tribes. I think the obligation with respect to the Indian tribes is greater. It is specified, in fact, in many of the treaties that the training component——

Chairman ABOUREZK. Nobody is arguing that. We are not talking about the basis of it, we are talking about where the social services go and the distinction between an obligation to a U.S. citizen and an Indian U.S. citizen.

Mr. ALEXANDER. The Indian services, as a part of the trust component, is a relationship to that individual and his tribe and is not a constitutional relationship. The relationship of the Indian person to the United States and the States and the counties, for social services that those government entities provide generally, the 14th amendment relationships that the United States is going to provide certain type of aging benefits. The heating of the homes and providing for anyone over 65 in the United States who has an income less than $8,000, any individual Indian who meets those qualifications has a 14th amendment right to those standards.

That is a constitutional relationship, and what we are talking about in terms of social services in the tribal context is a component of the trust relationship. It is a component of the dependency status, and it will vary, and the mechanisms of delivery are something that will vary. And we will get into that.

We are really not prepared at this point to get into the mechanics of the delivery systems for off reservation. There is great dispute between the tribes and between the urban Indian. The conception is important that some of those social services, where possible, should run through the tribal entity.

And the situation you suggested last time with the Chicago school system, 200 different tribal members, and the Federal Government

as the decider of the mechanics of delivery has some judgment it can make on how these services are delivered and in what context. That is something we will specifically get into.

Commissioner DIAL. The nonfederally recognized are having trouble getting recognition here this morning. It appears that your subject and your discussion is dealing entirely with the federally recognized. I am directing my question to Mr. Wilkinson. I believe he is still at the table.

First of all I would like to say, Mr. Wilkinson, that this is an excellent paper on the legal concept of Indian law. So following footnote 26, you state the scope of the trust responsibility extends beyond specific real or personal property, which is held in trust.

The United States has the obligation to provide services and to take appropriate action necessary to protect tribal self-government.

The doctrine may also include a duty to provide a level of services to Indians generally equal to those services provided by States.

Now, my question is: At what point in American Indian law do we find the language of nonfederally recognized tribes coming into the language of American Indian law? My second question is: Does the U.S. Government have a responsibility, even a trust responsibility, to nonfederally recognized Indians who have no lands, who have no reservations, who have no lands other than their own lands, who have never had any lands, who have Federal recognition, and who have never signed any treaty?

I would like Mr. Wilkinson to speak to this, please.

Mr. WILKINSON. Thomas Tureen, who is an attorney in the State of Maine, submitted a paper to task force No. 10, which I know you have and may well have read. He concludes generally in that paper that many or most so-called nonfederally recognized tribes are, in fact, entitled to services and to the trust relationship.

As a general proposition that is not the position of the Bureau of Indian Affairs, and I am speaking, Mr. Commissioner, in generalities to some extent because this is obviously a very complex subject.

Commissioner DIAL. That is why we want to deal with it because it is so complex.

Mr. WILKINSON. All right. There are staff recommendations dealing with terminated and nonrecognized tribes that our judgment will resolve this problem, that will provide procedures so that nonfederally recognized tribes can become federally recognized by anyone's standards.

In my judgment, at this moment, the law is not clear on this. I think Mr. Tureen's arguments are very persuasive, but they are not settled, and the staff, and I think the commission will move in this direction. I would hope it would.

We will have the opportunity, at least, to resolve this possibly unclear area.

Commissioner DIAL. So you are saying at this point it is clear, but you would hope that the American Indian Policy Review Commission will make this clear to the Congress and that the Congress of the United States, through appropriate legislation, will deal with this matter to provide services and so forth for the nonfederally recognized tribes.

Mr. WILKINSON. I think Mr. Parker has something to add to this, but I would just say, in my opinion, it is unclear. I respect very much

Mr. Tureen's opinion and those others who believe that many nonrecognized tribes are not nonrecognized and are entitled to trust relationship.

I just think the law is somewhat unclear in this area, but I think this Commission can resolve it and I think it is one of the first orders of business.

Commissioner DIAL. Then perhaps you would agree that the term nonfederally recognized tribe has no place in the Indian language.

Mr. WILKINSON. I would hope personally, and I know you feel this way, and other Commissioners do, that one central thrust of this Commission's report will be to eliminate that phrase, yes, sir; effectively to eliminate it.

It strikes me as an historically unfortunate event, largely administrative, and I think that those tribes are in a box, and very unfairly so. They are Indians and I think the Indian Commission has a chance to rectify that and I would hope that the Commission will see that issue as a frontline issue to effectively eliminate that phrase—nonfederally recognized.

Commissioner DIAL. Thank you, Mr. Wilkinson.

Commissioner BRUCE. One question, Charlie: What do you mean by not settled? You were talking about Tom Tureen's situation that it hasn't gone into court?

Mr. WILKINSON. Well, there are many tribes with pending petitions for recognition. The Passamaquoddy's have litigation, and other tribes have litigation. The Lummi's have had litigation.

All I am suggesting is that, in my opinion, the duty of the Federal Government is to provide services to a full trust relationship. In respect to the so-called nonfederally recognized tribes, it is unclear. It may well be that some of my colleagues here, on the Commission, believe that it is clear and those tribes are entitled to services, but that happens to be my opinion.

Commissioner BRUCE. I think it should be brought out here also, that these services available to Indians—on whether you are on or off the reservation, whether you are enrolled—there ought to be a clarification whether a person is automatically enrolled at age 16 or whatever. All the time, I think, in the education field we are running into: "What is my blood quantum?" And that is the right the tribe has to determine.

Mr. WILKINSON. I completely agree. I believe the staff recommendation, with possibly one exception—the Indian preference area—for the Commission to define Indian as someone who is recognized as a member of a tribe by that tribe.

There could be some exception to that, as a starting point, but I think it is very unfortunate, and in my opinion illegal, that the Bureau of Indian Affairs, in many cases, refuses to treat as members of the tribe people who are on those tribal rolls.

In my judgment, if a person's name is on a tribal roll the tribe believes that person is a member, and that is it, it is up to the tribe. The Bureau of Indian Affairs does not always follow that and I think that is illegal.

Commissioner BORBRIDGE. In reviewing what has been said, then, there seems little question as to the trust relationship derived from treaties and other instruments between the United States and specific

Indian tribes, even though such treaties may not always have been honored.

And that further there seems little question that there are certain rights that are derived in the secondary sense based on this specific trust relationship. Looking at the aspects of tribal sovereignty, one of the rights of such sovereignty derived from such status is the right of the tribe to determine its membership or its rolls and that based on that determination it may very well be that individual members, as determined by that tribe in fulfillment of this tribal sovereignty, may well be deciding off of the reservation.

The important point here is not where they are at any given time, but the fact that they are members of a given tribe and that that tribe has sovereignty, and that one characteristic of sovereignty is the right to determine membership.

Now, looking at another aspect, number one would be the specific relationship between the United States and a specific tribe. Could we not move to the point where we are looking at a relationship between the United States and Indians in general, in a broad sense?

And, here we, perhaps, may be able to define a relationship and an obligation existing between the United States and various individual members of Indian tribes. If that is true, then the United States would be able to recognize the variance and the status of the Indian tribes, and the fulfillment of its obligations. We are talking specifically about Federal services as they might be delivered.

Let me give you an example. Commissioner Dial has just indicated his concern about nonfederally recognized tribes without a land base. I would point to the Alaska situation as another example where we have land and resources which will not actually be under a trust status, but in which the Claims Settlement Act itself specifically states that such rights as the Alaska Natives have as members of the native American community shall not be reduced.

I am paraphrasing irrespective of the status of the land and resources. I guess the point I am making here is I am concerned that we be very clear about these two relationships.

The first one I mention, the relationship between the United States and specific tribes derived from specific treaties and other instruments. The second, the relationship of the United States and Indians or native Americans in general.

Would you comment on these two points?

Mr. WILKINSON. I always find it very hard to comment on your questions because I find that often they are statements of existing law and policy in a very sophisticated way. I felt that you had so many statements in what you said that it seemed to me you answer your questions.

But if I understood you, the central thrust of Indian policy now, and I believe will be continued in this report, is based on tribalism, so that the two central relationships, as I think you are suggesting, is between the United States and the tribes, and then between the tribe and its members.

So that trust responsibilities will tend to be derived from that kind of analysis which I understood to be your analysis, and in my judgment that applies to the Alaska Natives. That was part of your statement also.

Commissioner DIAL. Thank you.

Commissioner WHITECROW. Mr. Chairman, I would like to also—since we are talking about the nonfederally recognized tribes and the reservation tribes, and the Alaska Natives—point out that we do have Indians who reside in nonreservation status who are federally recognized tribes.

I point this particular aspect out that within the State of Oklahoma we do have a process that has taken place down through the many years—a process of the Federal Government, a policy of the Federal Government—the assimilation process which in effect has certainly done its job.

We do have the trust responsibility prevalent within that particular area. We have some 39 tribes in the area also, and that covers the State of Oklahoma. The State of Oklahoma itself, over the past 72, 73 years, and I am referring to that period just prior to statehood, during this entire period of time the tribal governments have experienced a complete emasculation, so to speak, and that Indian citizens within the State of Oklahoma, unless they still own portions of land, many, many of those persons have actually lost their relationship with their tribe.

The tribe is still there, the government is still there, the land and the geographic area by treaty is still there, and the trust responsibility should certainly extend into those areas and provide for reestablishing tribal government to protect those tribal governments.

In this entire report, the work that we are involved in is making an attempt, once and for all, hopefully by the Federal Government, that will be perpetual in the protection of these Indian tribes—whether they be presently federally or nonfederally recognized, urban Indians, metropolitan Indians, or the vast definition of Indians that we have.

If we are really genuinely working toward self sufficiency of Indians then we have to work toward self sufficiency of tribal government. If tribal government cannot be self sufficient, of course, we are going to be ending up with just about the same type of attitude that has been alluded to in the prologue whereby a comment was made that Indian citizens were to be a matter of charity, and a detriment or a parasite, so to speak, on the American taxpayer from now on.

I think we have to funnel trust responsibility down through tribal government. Congressman Yates, if you will recall in our last meeting, I suggested funneling all of the funds down to tribal government and allowing tribal government putting a responsibility on tribal government to determine whether total needs are in the budgetary process.

I think our BIA management review really spells this aspect out. The bureaucracy, within itself, must correspond and communicate and relay and work with tribal government to develop what is the total requirement in a budgetary process to deliver help, to deliver education, to deliver law and order in their area.

What are those total Government needs? Just recently, on the 28th of December, I wrote a letter to the Governor of the State of Oklahoma asking that the State of Oklahoma finally recognize that tribal governments truly are governments equal to the State and equal to the county and equal to the city in their responsibilities to their people.

I ask that they immediately begin setting out negotiations with these tribal governments and establish negotiations on jurisdictions

within their area, negotiations that can come about and hopefully if the orderly manner whereby tribal governments, State governments and other local governments can sit down together, resolve their differences, and assume those responsibilities. They are not giving the tribal government the total idea and total requirement as to the dollar needs so that treaty obligations can be fulfilled to that tribe by the Federal Government.

That those revenues, in addition to those services provided, would be the attitude toward making tribes self sufficient.

In regard to this I have a letter that I would like to read into the record that I think is most appropriate at this particular time, and this is a letter I received from the chief of the Creek Nation. I have copies of this letter I would like to share with the rest of the Commissioners, if I can find them. I would like to present the clerk with a copy for inclusion into the record.

If I may, Mr. Chairman, I would like to take just a few moments to read this.

Dear Commissioner Whitecrow, Subject, restoration of the Creek Nation. The Creek Nation appreciates your kind response to the letter of November 16th, 1976, to the American Indian Policy Review Commission. This letter is to elaborate on certain points raised in the letter which need expansion for clarification.

The most important long range goal of my administration is to restore the government of the Creek Nation, the self-governing status which is exercised until 1907, and which by law the Creek people are entitled to. The only reason that Federal legislation is needed is to one, eliminate the irrational provisions of the 1898 act for the protection of persons in the Indian territory, and the 1906 act for the final disposition of the affairs of the five civilized tribes in the Indian territory.

And two, to provide a rational framework for implementation of the rights of the Creek people. As background to these proposals allow me to review the 1898 and 1906 acts.

The 1898 act enclosed the tribal courts and provided that tribal law would be unenforceable in the courts of the Indian territory in the United States. The 1906 act specifies certain attributes of tribal jurisdiction which could no longer be exercised, such as schools, land offices, tribal buildings and records and et cetera.

The outright repeal of these acts is not practical. As certain guarantees were built into them, the Creek people could thereby lose, even though the United States and the State of Oklahoma did not recognize or protect these guarantees.

The lawful government of the Creek nation is stipulated in the 1866 treaty between the Creek nation and the United States, to wit the President is authorized to exercise general superintendent or care over any tribal nation which was removed upon an exchange of territory, under authority of the act, May 28, 1930.

To provide for exchange of lands with the Indians residing in any of the States, or territories, or for their removal west of the Mississippi, and to cause such tribe or nation to be protected at their new residence against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatsoever.

It is my understanding that this authority is the basis to establish the office of commissioner to the five civilized tribes. The legislative efforts of the Department of Interior and Senator Curtis of Kansas terminates the five civilized tribes in the early 1900's were wrong and poorly done.

These acts proposed by Kansas land speculators who were bribing Senator Curtis, I believe each of the five civilized in the middle of a legal quagmire unable to exercise proper jurisdiction for the protection and relief of their own people.

The power of taxation, the only rational matter of financing a self-sufficient, tribal government is prohibited by law to the five civilized tribes. But apparently is prohibited to no other tribe. There is no apparent reason for this distinction.

Tribal assets were confiscated, allegedly under the 1906 act, but without congruence to an act's requirements, that these assets would only be confiscated upon the termination of the tribal government.

The entire political structure of the Creek nation was emasculated by the legislative closing of Creek courts by the illegal suppression of funds to finance meet-

ings of the national council, and by the illegal appointment of the principal chief by the President of the United States, contrary to the laws of the Federal Government.

Under the 70 years of rule by appointed chiefs, other valuable tribal assets have been disposed of through the approval of these appointed chiefs. An act for the restoration of the government of the Creek nation should be proposed by the American Indian Policy Review Commission as 25 United States Code 1748, under the specific responsibility for removed tribes legal provisions must be made to allow the Creek people a transition from suppressed government to their rightful government.

The courts must be authorized to reopen under Creek law, the tribal roles must be reopened. Tribal documents not now in the possession of the tribe must be designated so that under Federal law title to such documents shall always remain with the tribe, notwithstanding intervening processors and the power of taxation must be restored.

With the power of taxation the Creek nation will be able to provide a responsible tribal government which is self sustaining. In addition appropriations must be made to compensate the Creek nation for its losses during a time when the Creek people had no control over their government.

A complete GAO audit of the Creek nation from 1898 to the present would not be out of line, indeed it would be welcome. These funds should compensate the Creek people for their loss of tribal real property, tribal personal property, and such individual property both real and personal which was lost through the absence of their functioning tribal government.

These funds must be under tribal control and specifically prohibited from per capita distribution. The reasons against per capita distribution of such funds are at the heart of the Creek nation's methods for internal control of reconstruction. We need to rebuild the travel economy.

The only way this can be accomplished is through tribal action, tribal programs, tribal facilities, tribal income and control by tribal government. These are the tools of economic realism, these are the tools necessary for the Creek people to regain their economic par with the rest of the American citizenry.

Economic losses affected individuals, but individual compensation through per capita will not resolve the economic problems. Per capita distributions are often perceived as attempts to buy Indian rights. These rights cannot be purchased on individuals.

Such rights can only be exercised by the lawful tribal governments which should have access to every available means of protecting the rights, customs, and social welfare of its citizens.

In closing let me emphasize the complex nature of the issue of the restoration. The government of the Creek people must be reestablished in order to protect the interest and welfare of all Creek citizens. That government must be given the economic means to rebuild the tribal economy, shattered by 70 years without self government.

Only the United States and the Congress can do this.

Sincerely,

CLAUDE A. COX,
Principal Chief to the Creek Nation.

Gentlemen, this pretty well spells out the attitude of most all tribal leaders that I have personally visited with. They want these funds funneled back to tribal government, and tribal government be responsible for delivering those services, those educational opportunities, and those health benefits.

Let the tribal government be responsible, and I think in the long run this would be a savings on the appropriations from a congressional standpoint, rebuilding tribal government and letting them rebuild in their own nation.

And it was for this reason, at our last meeting, that I did propose that we look into the possibility of world bank membership for each and every tribe. This kind of economic funds available and this kind of financing would be available through that method of financing.

Our tribes would be able to flourish and we would have a return to

tribal government and our Indian citizens would be once again holding their head high and proud to be an Indian. This is our responsibility, as this Commission, to try to bring about this kind of rebuilding and reestablishment with our tribes.

Thank you.

Mr. YATES. Mr. Chairman, the question of self-government raises another question with respect to trustee responsibility by the Federal Government. What happens if there is malfeasance by the tribal chief. Suppose there is a personal taking of some of the tribe's funds.

Is the Federal Government responsible for that?

Mr. WILKINSON. Yes; there is a 1942 Supreme Court case on that that holds that if the Government had notice and should have known that there might be malfeasance, there would be liability.

Mr. YATES. Only in that case?

Mr. WILKINSON. Well, it has been cited often in the Seminole Nation and as far as I know it is still a good law. But it did hinge on notice that it was not strict liability. It was not only malfeasance, it was malfeasance plus notice by the Government.

I used the second one that is made in connection with Commissioner Whitecrow's statement with the Government's providing the tribes with the means to be self-sufficient. He also indicated the Creek Nation would like the power to tax.

Will our Commission recommend the power to tax under self-government powers of the tribes?

Mr. WILKINSON. I will let someone else answer on Oklahoma.

Mr. YATES. I am not talking about Oklahoma.

Mr. WILKINSON. As a general matter, yes; tribes do have the power to tax.

Chairman ABOUREZK. They already had that.

Mr. YATES. So the trust responsibility of the Federal Government will go only to making up the deficiency between the revenue derived from taxation and the needs of these tribes, or is it contemplated that a tribe, being self-sufficient, will raise all their funds by their own taxing powers?

Mr. TAYLOR. Congressman Yates, my name is Peter Taylor, I am introducing myself since the reporter may not know me.

Chairman ABOUREZK. We are not saying that Congressman Yates doesn't know you.

Mr. YATES. We are old friends.

Mr. TAYLOR. We are making recommendations with respect to the power of tribes to tax. This gets us very deeply into tribal self-government and jurisdiction, which is a very lengthy subject. I would assume that we would be into that this afternoon.

Mr. YATES. All right, I can wait.

The next question I would like to ask Mr. Wilkinson is: I know that your treaties is that the Indian rights are predicated on the Constitution, and upon treaty rights. No reference is made to the Snyder Act, nor to the Indian Self-Determination Act of 1973.

Should not a discussion of those been added as well to show the rights of Indians and the trust responsibility of the Government?

Mr. WILKINSON. Those are cited in a footnote in the article. They are not discussed directly. They are, I believe, discussed in the history

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by D'arcy McNickle. I know they will be discussed in the tribal government sections and the Federal administration sections.

In other words it was my judgment that those acts did not involve unique principles of Indian law. They are acts which are examples. There are many other examples of the kinds of powers tribes have and the kinds of powers Congress has.

But I don't see anything unique in those acts. They are important acts but I don't see anything of a legal consequence.

Mr. YATES. Perhaps I am wrong but I find that the Snyder Act, at least, extends the trust relationship in its purpose. The Snyder Act is frequently relied upon by proponents of trust treaties to show that the Federal Government does have a responsibility beyond the constitutional and the true trust responsibility arising from this legislation.

That was the reason I asked my question.

Mr. WILKINSON. I think that is a good point and I suppose I would answer that this way. To say that by footnoting, to Reed Chamber's article where he discusses that, I felt that those concepts were intertwined there. I suppose I personally look at that and this as your report, obviously, not mine.

If you wish to have something in it like that we can clearly do that. It was my feeling that that was perhaps moving beyond the level of detail we were dealing with in this section. I think it will be mentioned later in the report, but in terms of dealing with the basic concepts of Indian law, for whatever reason, I decided that it was perhaps a little bit too much detail.

Mr. YATES. Well, it seems to me that it bears upon your footnote 28, where you talk about a duty to provide a level of service to the Indian. The Snyder Act can be used as a foundation for the provision of such services.

Mr. WILKINSON. It certainly can. I think Mr. Parker has a comment. I would just add again that I believe Reed Chambers does use that kind of analysis and I suppose by footnoting to the article I was intending to effectively incorporate this kind of argument.

Mr. HALL. Congressman Yates, that argument with respect to the Snyder Act is also used in the context of trust and the legal review by task force 1 in their report, and it also, like Charlie's piece, is footnoted in task force 4 as support for that position.

Mr. YATES. Thank you.

Mr. PARKER. Congressman Yates, before we leave that point I would like to return to it because I think that from discussions so far it really hasn't been clearly set out what is at issue here.

Indian people, out in Indian country, clearly have a very inclusive idea of what trust responsibility is. They think that it includes a total responsibility that the United States owes to Indian tribes.

The Federal Government—in the person of the Justice Department lawyers and the Interior Department lawyers—have a restricted idea of what the trust responsibility is. They are pursuing a policy which they are not required to under any given law, but this is their interpretation of what they think the law is.

Pursuing a policy where they would define the trust responsibility as only going to the protection of natural resources, and anything else that the Feedral Government does for or with Indians in their view, under that definition, would not be a trust responsibility but a service.

It looks like Chairman Abourezk doesn't agree with that.

Chairman ABOUREZK. This is not one of the thoughts of Chairman Abourezk specifically.

Mr. YATES. The chairman has spoken now, but I was under the impression that when you talked about your idea of the trust responsibility it went to the land and to the resources, which the tribes have.

Chairman ABOUREZK. But I also said, at a different point in the discussion, that the Federal Government provided social services through the tribes which is what he was saying the Indian people believes is part of the trust responsibility.

Mr. YATES. I am sorry, Mr. Parker.

Mr. PARKER. Let me continue because I think this next point is very significant. I have been working closely with the staff on the task force although I haven't been on the staff in the area of trust law. We have followed the logic of the concept of the trust responsibility to go primarily to the protection of the right of self-government.

We see as first and foremost in the concept of trust responsibility the survival of Indian tribes. Logically that means that services that Indian tribes perform as a government have a trust aspect and to that degree those kinds of services—social welfare services, law enforcement services, or whatever—have a trust relatedness and the individual who participates in those services participates in a trust service.

But if an individual is off the reservation and participates, say in an educational benefit, that is extending the logic one step further. Now, I am not sure we have developed the definition to extend it that far but in our minds there is clear support and clear logic to extending the trust responsibility to a service area as it relates to the tribe as a government, and a tribe functioning as a government. I just wanted to make that point.

Mr. YATES. Is that as far as you are going in that support?

Mr. PARKER. No; Mr. Hall would refer you to the specific language.

Mr. YATES. To task force No. 8?

Mr. HALL. I was going to suggest, Mr. Chairman, since we are—by the subject matter of our conversation—talking about principle one, for our recommendations for a policy adoption by the Commission in chapter 4, if we want to, that is a good jumping off point as an introduction to that principle one.

Mr. YATES. Where is principle one?

Mr. HALL. Chapter 4, section 3. It is about 10 pages back and, unfortunately, the pages aren't numbered. But about 10 pages back in chapter 4.

Mr. YATES. Footnote 37 of chapter 4?

Mr. ALEXANDER. Yes; the next page after that.

Mr. PARKER. It is clearly labeled "findings and recommendations" at the top.

Mr. YATES. Yes.

Mr. HALL. If I could add a comment to Alan's: We have attempted here to, in effect, take a middle ground between what we consider two extremes. An interpretation of the trust, that is the strict construction as with respect to the trust as it only relates to recognized tribes as determined by the Federal Government and only to lands and natural resources. That is one end of it.

The other end of it is that the trust responsibility is a sweeping legal duty on the part of the Federal Government which runs to all

Indians, all tribes regardless of where, the circumstances, the relation to the tribe, et cetera.

These policy statements are intended to split, in effect, those two extremes which we feel represent a recognition of the law in most areas and some part of a clarification or a step forward on the part of Congress in other areas. It should be remembered, of course, that there is no question that the Congress can define that trust as it well pleases. That is what we are attempting to do here, to define it. Not a specific definition but at least setting forth guidelines with respect to how Congress interprets how that should be carried out by the agencies.

That is what the six principles are intended to do. The first point you made on Charlie's legal review is the question on services: Who do they go to and what does it mean?

Well, you will see that principle one purposely does not define the services that we are talking about specifically. That is for two reasons. One is that those services could very well change or be changed by Congress over the years, and two, that those services may very well vary depending on which tribe you are talking about in relationship.

The Government historically has in the past provided to that tribe, currently is providing to that tribe, and may provide in the future. Congress can make those determinations. It is broad enough to allow for that to be provided clearly.

Exactly what services may, how long, and to whom may change, but the trust duty of the Federal Government remains constant. The trust duty to provide those services remains constant, but that doesn't mean that the manner in which they are carried out and the precise distribution of them cannot be altered by Congress over the years. That is what that is intended to do. That is principle one.

It says United States trust responsibility to the American Indians is an established legal obligation which requires the Federal Government to protect and enhance Indian resources and tribal self-government.

I think that when we are talking about the trust, and we are trying to determine what services and to whom, in the back of our minds should be the purpose of what responsibility is.

We have taken the position that the purpose is to enhance the property, resources, and principally self-government—the ability to govern by self-government. The last sentence of principle one includes the duty to provide whatever services are necessary for such protection and enhancement. That clearly allows some flexibility, and I think it should.

Mr. YATES. Well, I am afraid you are going to cut off Indian health benefits if you limit it to that.

Chairman ABOUREZK. This is a good point to break in and recess for lunch.

We will return here at 1:15.

[Whereupon, at 12:20 p.m., the hearing adjourned for luncheon recess, to reconvene at 1:15 p.m.]

AFTERNOON SESSION

Chairman ABOUREZK. The Commission meeting will resume. Where were we?

Mr. ALEXANDER. We were on the recommendations in the trust chapter. The first set of recommendations are the six principles that we are recommending for adoption, and we were discussing principle No. 1.

Chairman ABOUREZK. What page are you on?

Mr. ALEXANDER. It is under Roman numeral III in chapter 4. It is the 10th page back.

We discussed the powers of Congress last time. In any event there was some question raised on principle 1 as to whether the way it was phrased would include social service type programs under the trust obligations.

In the text section, several pages preceding this, I think it is made clear, although it can be expanded.

Mr. YATES. Give us a footnote to go by.

Mr. ALEXANDER. Footnote 34. It is 2 pages back. Starting after footnote 33 it states:

> As previously stated the purpose behind the trust was to ensure the survival of Indian tribes and people. This necessarily implies a prevalent obligation to provide those services required to protect and enhance.

And moving on it concluded with: "whatever economic and social programs are necessary to raise the standard of living and social welfare of Indian people to a level comparable to the non-Indian society."

Now we can expand on that also with the congressional recognition of the trust obligation in the Snyder Act and so on, as congressional definition of what that means in that text section.

Mr. YATES. All right, that might be helpful. Something to the effect that this principle or this concept has been recognized by the Congress by passage of the Snyder Act.

Mr. ALEXANDER. And under recent acts, Indian Health Service and so on.

Rather than reading the six principles, I would just inquire as to whether there are any specific problems that members of the Commission have with any of the six principles?

Chairman ABOUREZK. I am not so much interested in the substantive content of these statements as I am in how you are presenting them now. Do you intend to change the way these recommendations are going to be made, or is this the way they will stand in final draft?

Mr. ALEXANDER. There may well be light editing and there will be consistency throughout the report in how the recommendations are phrased.

Chairman ABOUREZK. Well, the point of what I am saying is this. That I think this report, from the point of view people who are

writing it, ought to be viewed as a document that will be picked up by the 535 Members of Congress and their staffs. You have to make the basic assumption that those people have no background in Indian affairs whatsoever and that it will have to be an extremely readable document. One whose concepts are easy to grasp without a great deal of background reading. Therefore, it is going to take a lot of time and a lot of work to write in that manner.

It is very easy for someone who is technically proficient in the subject matter as you are. It is very easy to write a great exposition of what you know, but what is more difficult is to write an exposition of what other people don't know so that they can understand it.

Now it seems to me in looking at this that a Congressman could not pick up this report according to the way these statements are written and take it up to the legislative counsel and say draft me a bill that is consistent with this recommendation. That is what is really needed. That is the point I am trying to get at.

I would like your comments and those of the other commissioners.

Mr. YATES. I agree with that. I thought that perhaps the staff ought to have prepared a draft bill to implement the recommendations of the Commission. But it is an onerous burden.

In the absence of that I certainly would concur with the position you just stated.

Chairman ABOUREZK. It is not really a recommendation to say that in principle No. 1 the U.S. trust responsibility to American Indians is an established legal obligation which requires the Federal Government to protect and enhance Indian resources and tribal self-government. That is a finding of fact, it is not a recommendation. That is the basis of the recommendation.

Mr. YATES. Well, that could be in a premise to the legislation couldn't it? In the whereas section, perhaps, or the preamble?

Mr. ALEXANDER. I think as a concept that is perhaps missing in the way that it is phrased. I think we can clean it up and do what you want.

We are asking that the executive branch, the administrator of the trust, to have guidance from Congress spelling out what its legal obligations are. This gets back to the point we had earlier about the Justice Department taking the position that the trust runs to lands.

Chairman ABOUREZK. Let's go through that then. On principle No. 1, what is it that you want to achieve?

Mr. ALEXANDER. Do you want to state it?

Mr. HALL. Well, these would be——

Chairman ABOUREZK. Let's stay with principle No. 1 here. What is it you want to achieve with that principle?

Mr. HALL. That would be an official recognition by Congress that this is fact. This is what Congress wants to recognize as a policy with respect to how the trust is carried out.

Chairman ABOUREZK. All right. In your mind: How should Congress recognize that policy?

Mr. ALEXANDER. By legislation that directs the Federal Government, the administrator of the trust, that the Congress is stating that the trust obligation runs to lands, the protection of tribal self-government and the rest of that principle. That it is not the narrow view that they have administratively determined.

Chairman ABOUREZK. All right. What is wrong with you writing in the recommendation that it is recommended that the Congress direct the administration such and such?

Mr. ALEXANDER. That is what I was suggesting.

Chairman ABOUREZK. In other words, we are going to need to know, according to the way you write it, exactly what must be done. People who are drafting these things and people who are considering them in Congress are not going to have time to sit down and go through all the machinations. You should go through the machinations and bring it out. It is just a very straightforward package.

Any comment on that?

Commissioner BORBRIDGE. Mr. Chairman, as I understand it, we are not suggesting that these premises which are important to any success we may have in persuading the Congress should be deleted but rather one step farther should be taken in giving these principles and what specific actions the staff recommends.

Chairman ABOUREZK. Absolutely.

Mr. YATES. May I make a suggestion, Mr. Chairman, respecting language in principle No. 1? I am a little troubled by the use of the word "necessary." That is going to be open to a great deal of question. What is necessary? I suggest that instead of that you say this includes the duty to provide services for such protection and enhancement.

Mr. ALEXANDER. All right. I think that is better.

Mr. YATES. May we go to principle No. 2 for a suggestion?

Chairman ABOUREZK. Please do so.

Mr. YATES. I don't like the phrase "wherever he or she may be." Was your intention to refer to their location whether on or off reservation?

Mr. ALEXANDER. Yes.

Mr. YATES. Why not say that then, "whether on or off reservation"?

Chairman ABOUREZK. That is a good point.

Mr. YATES. I am troubled by principle No. 3 in a sense. Why doesn't the BIA Director qualify under that? I wouldn't want the BIA Director to qualify under that. My own feeling right now is that there should not be a BIA within the Department of the Interior. I don't know whether or not you are proposing to take a position on that or not, but it would seem to me that where you say "there should be in the executive branch one prime agent charged with the principal responsibility to faithfully administer the trust", isn't that the BIA man?

Mr. ALEXANDER. It is currently but that contemplates that there can be a number of alternatives as to where that trust obligation be primarily administered. All that is saying is that there be a prime agency but it is not locked into the existing structure.

Mr. YATES. Well, shouldn't you say that you don't want somebody who is like the BIA Director now within a department that has a conflict of interest, something along that line?

Mr. HALL. What would be said there, I think, Congressman Yates, is that language would have to conform with the rest of the report. Now if the Commission adopts the concept of an independent agency or trust council or whatever and BIA is taken out of the Department then that language would be changed to reflect directly that recommendation. In other words, it wouldn't be left general.

I don't conceive of this being left general language like this; it would be changed to say one prime agent which would be, or which shall be or which is the Department of or however the rest comes out.

Mr. YATES. I see. Well, I was going to suggest language which was such: "Unlike the present relationship where the agent ostensibly representing the Indian people is in a department that finds itself in a conflict of interest situation." Perhaps the word "independent," should be in there somewhere.

Mr. HALL. That is a good one.

Mr. YATES. Independent and free to act.

Mr. HALL. Right.

Commissioner WHITECROW. Mr. Chairman, did we not actually state this in our previous meeting in regard to seeking a separate Department of Indian Affairs? Why don't we just state that in this principle No. 2?

Mr. HALL. That is fine. I think that is a form more than anything, in other words, to be plugged in there would be the precise terminology that we selected. If it is Department of Indian Affairs, then it would be changed indeed to Department of Indian Affairs.

Mr. ALEXANDER. Yes; but the report is one report, but there are also parts of it that are separable, in that Congress may well wish to act on trust principles at a point in time when it is not yet willing to establish a particular agency. The concept of a prime agent that is independent is important by itself regardless of what mechanical arrangement is recommended in another area of the report. It has to have separability—the report—as well as consistency.

Mr. YATES. Jake, I think that is a valid point, don't you?

Commissioner WHITECROW. I am sorry, sir?

Mr. YATES. I say I think that is a valid point until such time that a department is approved by the Congress. For that interim period you ought to at least have an independent agency outside of the present system.

Commissioner WHITECROW. Right.

Mr. HALL. Principle No. 4 I would point out, I believe everyone has a change in that. The current No. 4 that you have there should be deleted. It is a separate page that was passed out that is now 4a, 4b.

Does everyone have that? If not, I will get a few extra copies.

Mr. WILKINSON. If the Commission please, you will recall that at the last session we had an extended discussion about the so-called consent provision that was in the earlier recommendation. In other words, the recommendation that existed last time was to the effect that Congress could not abrogate treaty or other trust rights without the consent of the tribe. I believe several of the congressional members went on record, and perhaps the Indian Commissioners also, believing that would hamstring Congress or Senator Abourezk with passing an act which might very well have to be broken later.

This procedure here is intended to provide strong protection for these important rights and yet to obviate the problem that came up last time—4a and 4b work together.

First, if treaty or other trust rights are to be abrogated, Congress would seek to obtain the consent of the tribe first. If the consent is not obtained, Congress would not act unless there were extraordinary circumstances or that compelling national interest requires otherwise.

In other words, it is an open consultation with the tribe with a heavy bias toward consent but not a requirement of consent. Then under principle 4b Congress could act expressly to take away those rights as so many recent cases have indicated.

It is felt that this express action requirement which again is reflected in a series of Supreme Court cases, but in my judgment at least has not been truly definitively established—is a fundamentally important provision. It would put any abrogation of important Indian rights in legislation, would provide notice to Congress—to Indians that specific trust rights were to be abrogated or broken, would provide notice to the tribes and would provide full and open hearings.

I think many of you know the tragic story of the Seneca Nation situation where the Army Corps of Engineers flooded some 80 percent of the Seneca land without express direction from Congress. There is a serious problem, a legitimately serious and widespread problem of administrative agencies acting on their own without direction from this body. This kind of provision would require, would provide that a dam could be built on Indian land and land could be flooded. It would permit a highway to be built on Indian land but before doing so Congress would seek to obtain the consent of the tribe.

If the tribe were not willing to consent, Congress would take action elsewhere. Perhaps off the reservation. Unless there were extraordinary circumstances. If there were no alternatives and if it were a serious national need, then the project could go ahead anyway.

Then when the bill was introduced there would be specific reference in the legislation so that the affected tribe would know of it.

Again this is my personal judgment, and I think that of the staff, and this was reflected consistently through hearings in the field. We see this as a truly fundamental working——

Mr. YATES. Do you know of any other instance where the Congress is required to obtain consent before enactment of legislation you have in 4a?

Mr. WILKINSON. I know of no other instance. I also know of no relationship that Congress has with any other group like the trust relationship.

Mr. YATES. The Congress really doesn't have that trust relationship, it is the Federal Government, really, rather than the Congress.

Mr. WILKINSON. Well, yes; but Congress is the only body with authority to pass legislation affecting the trust relationship. Since that is literally unique it may be appropriate for a consent provision to be used here. Now the expressed abrogation point has been followed elsewhere. There are other examples of expressed abrogation. But under consent I personally do not know of another area where consent is required.

Mr. YATES. I wonder whether this is an unconstitutional provision. By requiring Congress to require a consent before it gets legislation——

Mr. WILKINSON. No; because of the escape clause Congress could legislate.

Mr. YATES. I must say that is the most extraordinary escape clause I have ever seen. You have got extraordinary circumstances with compelling national interest.

Chairman ABOUREZK. Sid, I don't think that Congress can prevent itself from legislating. I think what this really amounts to is a state-

ment of policy on the part of Congress that before any legislation is passed the consent of the people affected should be achieved under certain conditions.

The Congress, as you well know, could override this particular statement of policy any time they wanted to. So it is not unconstitutional.

Mr. MEEDS. Charlie, does this replace that section dealing with abrogation of treaties? The first report indicated that treaties could not and would not be abrogated without the consent?

Mr. WILKINSON. That is correct, Congressman.

Mr. MEEDS. Which was an absolute infringement on the sovereignty of the United States, was it not?

Mr. WILKINSON. It is wonderful to have you back. I really mean that.

Mr. YATES. What did you say?

Mr. MEEDS. I am sorry. I may be asking for trouble.

Mr. WILKINSON. It absolutely does replace that. It was our interpretation of the Commission's intent that you wanted that replaced and this 4a and 4b replaces that.

Mr. MEEDS. Wouldn't it be better to just state that it shall be the policy of the Federal Government to seek the counsel, advice, and consent of Indians with regard to any changes in treaties rather than suggesting that they first obtain the consent of the tribe and suggesting further that there must be extraordinary circumstances? If you laid it out as a national policy that we don't want to go around abrogating treaties then I think everyone would agree with that.

Mr. YATES. Will you yield, Lloyd?

Mr. MEEDS. Yes.

Mr. YATES. It seems to me that the concept is wrong. I think that we ought to follow the procedure, that I think is established, that would require that the agency which is acting under the legislation passed by Congress take steps to see whether or not there is going to be an abrogation of trust responsibility. If there is, then that agency should then attempt to obtain the consent of the appropriate Indian tribe rather than having the Congress do it.

There is an executive agency that is going to be required to do it, because Congress just does not do something like that. The agencies are the ones that are directed to carry this out, and the agency should report back with a statement as to whether or not a compelling national interest was required.

Mr. WILKINSON. I would, Mr. Congressman, urge some sort of oversight. I have been in too many negotiations with the Army Corps of Engineers to wonder whether that consent provision is going to have any weight, if there isn't some sort of reporting mechanism back to Congress.

Chairman ABOUREZK. I have a perfect solution. What would be wrong with a provision calling for a trust status impact statement, similar to an environmental impact statement, that if an agency is going to affect or deal with an Indian tribe in any way, then they should look into whether or not the trust status will be affected by their actions and provide that kind of a report to Congress and to the tribe and to the public? How does that sound?

Mr. YATES. It is all right with me.

Mr. MEEDS. I still have problems with this. I think you may recall our discussion of the last session where we were discussing the right of condemnation. Would you agree that section 4b, in effect, establishes that there can only be condemnation of Indian land by express congressional act?

Mr. WILKINSON. Absolutely, but it definitely does permit it. I would say that there have been many instances in which Congress has acted expressly in regards to Indian lands.

Mr. MEEDS. I understand that. In that respect, however, Indian lands are different than mine, different than Senator Abourezk's, and different than yours.

Mr. WILKINSON. Yes.

Mr. MEEDS. Now the present acknowledged law is that with regard to 4a Congress has plenary authority over Indian matters, if we adopt this, are we the law as it is today, as it is acknowledged even by the courts?

Mr. WILKINSON. In 4a?

Mr. MEEDS. Right.

Mr. WILKINSON. I agree with that.

Mr. MEEDS. It is an extension of the present concept.

Are we voting on whether we accept this?

Chairman ABOUREZK. I think it is proper to vote on whether we accept these principles or whether we want them changed.

Mr. YATES. I don't think we have reached that point yet. We are in the process of discussion on it. As I understand, we are changing words.

Chairman ABOUREZK. But at some point today I think we ought to indicate to them whether, with a vote or just general consensus that they should just go ahead.

Mr. YATES. Merely as a grammatical question: Is the phrase "infringed upon" better than "any way infringe any treaty rights or nontreaty rights"? Why is the word "upon" necessary?

Mr. HALL. To be honest with you, I think grammatically "upon" is probably required but I will check with the dictionary and see. If not, then we will cut it.

Mr. YATES. I don't think it is required.

Mr. HALL. It isn't?

Mr. YATES. Infringed is a breach isn't it?

Mr. WILKINSON. I simply don't know. I thought the "upon" was required.

Mr. YATES. Will somebody call the Library of Congress?

Chairman ABOUREZK. I think Sid Yates is right.

Mr. WILKINSON. I wanted to say, Senator, my initial reaction—my colleagues may have different reactions—is that your idea of a trust responsibility impact statement seems to me to have some merit to it. It would be one way of approaching 4a differently.

I would certainly urge that there be oversight by Congress, as you suggested, that it be submitted to Congress and go into effect unless within 60 days Congress disapproves the statement.

Chairman ABOUREZK. I think that is a good way to go.

Mr. HALL. The thrust of 4a and b both, should be that if there is any infringement at all Congress is the one taking the action to make

that infringement. An executive agency should not have the discretion to do so with the thrust of these two.

Mr. YATES. There is one question that I would like to ask at this point. What happens if Congress passes legislation authorizing construction of a dam that would include Indian land? Would that provide congressional consent under this?

Mr. WILKINSON. There is a circuit court case, that came down 2 months ago, that answers that. It struck down Army Corps of Engineers action because there was not specific congressional direction. In other words, they were operating under their general authority to build dams in the Missouri River Basin, and the court found that was not specific enough.

In my opinion 4b is probably the law now, and this would simply be a congressional recognition of it. But if, for example, an act were passed permitting the construction of a dam in a certain area, the agency could not go ahead unless there was specific mention of Indian lands to show that Congress, in fact, intended that trust land to be taken.

Mr. YATES. I have some trouble with the second sentence in 4a. I think it is a case of overkill. I just wondered whether your point isn't covered by the language that says "such rights shall not be abrogated or infringed except where the national interest is involved." There has to be a finding of national interest, and whether compelling or not. Who is going to decide whether it is compelling?

Chairman ABOUREZK. I really think this idea of some sort of an impact statement would take care of all of this. Once that is provided for, under a procedure that we can outline, it is going to enter the political process anyway.

It is brought to the attention of Congress and committees. Somebody is going to raise a question about it, the Indians will testify, and the Corps of Engineers will testify. Everybody is going to come in and express their interest to Congress and we are either going to approve it or disapprove it anyhow. I think Sid is right about leaving out that national interest. It is sort of complicated, the same objective will be served by some sort of a statement by the administration. If the Corps of Engineers were to plan a dam somewhere that did take trust land, and if they even lied about it and came back and said their statement does not affect Indian trust rights, that statement can be easily challenged. You can also provide that a statement must be given to the tribe for their comment.

Mr. YATES. The problem with that is the fact that Congress won't know about it if the same procedure were followed as with EPA. Because we just won't know whether they have complied with it unless it is filed with the clerk or with an appropriate committee of the Congress.

We could put that kind of language in there to see who the opponents are.

Chairman ABOUREZK. That is right. That is all part of the procedure. I think the general idea is there though.

Mr. YATES I like the idea. I think that is a simple and effective way of doing it. What does the staff think about it?

Mr. HALL. Let me see if I understand now. The impact statement would be prepared by an executive agency but the final decision with

respect to whether that project went forward or not would still rest with Congress. Is that correct?

Chairman ABOUREZK. That is right. You could do it through a congressional veto provision. Let's say that the proposed project is a dam by the corps. They would not be able to proceed unless within 30 to 45 days, whatever, a majority of one House of Congress or both Houses, whatever, vetoes that. We have a lot of congressional veto provisions in legislation now that works very well. Taking the controls off gasoline prices is something we are considering right now.

Mr. YATES. Our friend, however, is going to tell you that he would rather have congressional approval rather than congressional veto.

Mr. ALEXANDER. I would rather have affirmative congressional action, where it has to face testimony and other alternatives in such a serious issue as diminishment of Indian trust lands by administrative agencies who have all the facts and figures and bureaucrats to make an overwhelming presentation that I really think the veto sense is not a strong enough protection.

Chairman ABOUREZK. Then does anybody on the Commission agree with that concept, or does anybody disagree with it?

Mr. MEEDS. I disagree with it. I think that if you are going to do that you might as well just leave it the way it is, because it constitutes, at that juncture, a requirement of affirmative action by the Congress and it is the same as requiring the affirmative action to be initiated by the Congress.

Chairman ABOUREZK. But at least you don't have an impact statement now where you would under a new provision. I think it would be pretty good to have an impact statement.

Mr. MEEDS. I have no objection with the impact statement. In fact, I think that is not a bad idea. But clearly, what you are doing by saying this is that you would prefer to have Congress initiate the action. At least what I thought Mr. Yates was saying is that an agency ought to be able to go ahead with this once they have shown the impact and Congress has not disagreed with it.

As legislators, we all know there are a lot of differences in those two ways and we know there is a lot of difference, too.

Chairman ABOUREZK. Well, I think that is what they were saying. That it exercises more caution to have an affirmative statement and I think caution is required in this case.

Mr. YATES. Ordinarily, under the rules of the House, you don't consider legislation unless you have a report from the administrative agency. The committee affected ordinarily will send out the proposed legislation and ask for a report and an opinion of the agency.

Is there any way of using that kind of a procedure to require the opinion of the Indian tribe affected before the legislation is considered—so that could be considered in the report at such time as Congress considers the legislation? In that way you will have a simple way of establishing a procedure for letting the Congress know what the opinion of the tribe concerned is, and knowing that the Congress can then consider the legislation and decide whether or not it wants to pass it.

Chairman ABOUREZK. Sid, may I relate how I perceive this thing? The general authorization bill is passed giving the Corps of Engineers the authority to build dams along the Missouri River. They choose as

a site for one of their dams a reservoir location that would condemn Indian trust land. Under this proposal, once they see on the map that takes in Indian trust land, they would be required to prepare a trust status impact statement and provide it to the committee in Congress, whichever one is designated, and to the tribe itself, stating whether or not this would have an adverse impact upon the trust status of the Federal Government. I think what they are saying is the burden of proof then ought to be on the agency to show that there is an overwhelming interest in abrogating that treaty or that trust status. Therefore, they would have to come back then with an impact statement on the proposed bill saying that this land ought to be taken in spite of the fact that it does abrogate the treaty right or nontreaty right that the Indians have. The burden of proof is then on the agency. They would have to bring the bill through Congress and at that time there would be time to hear testimony from both sides.

Mr. YATES. Except that before the Congress authorizes the Corps of Engineers to construct a series of dams on the Missouri River it would require the corps to give it in detail where the dams are to be constructed to the committee. At that point the committee would ask for the corps recommendations, and then there ought to be a corps report, and also an indication to the committee as to whether or not any Indian land is affected.

Chairman ABOUREZK. I don't think the committee would know until the corps starts drawing its maps.

Mr. YATES. As to whether——

Chairman ABOUREZK. As to whether it takes in Indian lands or not.

Mr. YATES. You mean that Congress approved the construction of the dam without knowing where it is?

Chairman ABOUREZK. Certainly.

Mr. YATES. It never comes back to the Congress?

Chairman ABOUREZK. Not in the authorization process.

Mr. YATES. It does in the appropriation process.

Chairman ABOUREZK. Yes, it would have to in the appropriations. By the time they are ready for money you are ready for knowing where it is and so on.

But there is another point involved there. Now just assume that there is nobody in the Public Works Committee who cares whether they take in the Indian trust lands. The Indian groups would know they have access to those committees and then could come in and complain about it. I am not sure that the Public Works Committee would be all that interested one way or the other.

Mr. YATES. If any Indian land is affected, couldn't the committee be required to inquire of the Corps of Engineers whether it was possible that the Indian land would be affected?

Chairman ABOUREZK. Well, you do that through the requirement for an impact statement.

Mr. YATES. But then it doesn't come back to the committee, does it?

Chairman ABOUREZK. Well, it could be given to Public Works, but it also should be given to the Indian Affairs Committee.

Mr. WILKINSON. It would seem to me that the way this could proceed, if I understand your ideas, would be to have the General Authorization Act, that would not be sufficient unto itself to build a dam on Indian trust property.

When the corps sought to build a dam on Indian property it would submit a bill to the Indian Affairs Committee which would expressly provide that Indian land was to be taken. At the hearings the impact statement would be provided to the committee and then Congress could act on that express piece of legislation.

Mr. YATES. But should it go to the Public Works Committee as well?

Chairman ABOUREZK. That is fine.

Mr. YATES. I should think that procedure would be preferable, so that Congress would know before it approves. Well, what you do is give the corps conditional approval. You require the corps to have conditional approval which would be final for all land other than Indian land. It is a conditional approval only for dams that affect Indian lands. In which case they will have to come back to the committee if Indian land is involved for their consent.

Chairman ABOUREZK. Well, for a hearing.

Mr. YATES. Yes.

Chairman ABOUREZK. And for approval of special taking of the land.

Mr. YATES. Yes; I think so. That is why I wonder whether you need all this language in here, whether we ought not to put in a procedure.

Mr. WILKINSON. I think that would definitely be preferable, and we would, I guess, seek to redraft alone those lines.

Mr. YATES. Let's redraft it then.

Mr. ALEXANDER. Leaving in Federal Government obligation to negotiate with the tribe before coming to Congress for abrogation. The corps should have an obligation to try to sit down and negotiate and have the tribe present alternatives to it and so on.

Mr. YATES. I would say that the corps should find out whether the Indian people involved are going to consent to it. If they consent to it, that is the end of it. If they do not consent to it, the corps is under an obligation then to report back to the appropriate congressional committees that the dam should be constructed but that the Indian people affected do not favor such construction.

Chairman ABOUREZK. Well, I think that if the Indian tribe agrees to it, that could be stated and the legislation would go through with everybody's approval.

Mr. YATES. That is right. That would be automatic. And the only time it would be conditional is when the tribe did not approve.

Mr. WILKINSON. I just wanted to say, and I have done some research in this area, in my judgment that would be a truly historic piece of legislation that is workable and is, I think, a major area of work in this Commission.

Mr. YATES. We are glad to have that.

All right. What is next? Are we passing over No. 4?

Chairman ABOUREZK. Did we pretty much agree on the first three principles then? Does anybody else want to comment on those?

Mr. TAYLOR. Mr. Chairman, I would like to make an additional comment. In our prior discussion in November this discussion was coupled with a concept of condemnation of land in an acre for acre—or in lieu of land, manner of recompense to the tribes for their loss. Congressman Meeds, I know, had quite a bit of dialog on that. I think that the concept should be coupled at this point. What is at stake here is this continuing diminishment of the tribal land base.

I used a figure in the last meeting that over the last 40 years during a policy of land acquisition for tribes 1,800,000 acres have been lost as a result of condemnation. You look up and down the Missouri River Valley which we have been talking about and it seems incredible the way these dams are always at the south end of an Indian reservation. There has got to be some termination of this land lost.

Now I agree with Charlie. I think what has been proposed here is a great step forward. But I believe it is not a sufficiently long step. I believe that the condemnation concept should also be worked in.

Chairman ABOUREZK. All right. What is wrong with a bit of language saying that wherever possible, in determining this whole situation, that Congress should make every effort to compensate in kind for land condemned rather than in money payments.

Mr. MEEDS. It is my understanding that we were going to do that?

Chairman ABOUREZK. Yes; it got lost in the shuffle.

Mr. TAYLOR. We had some agreement but, because of this rework here, I was afraid that agreement had been lost.

Mr. MEEDS. Is this something to be effected, that when condemnation of land is required as set out in this procedure that you establish that the Federal Government will make every effort to compensate in kind to provide land similarly located wherever possible and so on?

Mr. YATES. We have been talking about condemnation of land; we are talking about all rights, so that is only to refer to the land in your draft.

Mr. HALL. That is correct, but I think it could easily be put in there with respect to where the trust lands are being taken.

Mr. YATES. In principle No. 1 you refer to the U.S. trust responsibility and in principle No. 5 you talk about the trust responsibility. Which do you prefer, the United States or the Federal Government? They should be the same, shouldn't they?

Mr. HALL. Yes; it is an oversight—the United States.

Mr. YATES. Which do you like better, and why shouldn't No. 5 be combined with No. 1?

Mr. HALL. Well, it could be, the only difference is they perhaps should be closer together but No. 1 is some characterization of what the responsibility is and No. 5 is a characterization of how that responsibility is to be carried out, and at what applicable agency.

Mr. YATES. Isn't the first principle you want to establish is what the responsibility must be? The highest care, rather than putting it at No. 5. It should be up there at the top. This is to say this is the highest responsibility, and I think you should combine them both.

Mr. HALL. OK. I agree.

Mr. MEEDS. Mr. Chairman, may I ask a question about principle No. 1? The trust responsibility extends to Indians, and to tribes, and so on. It requires the Federal Government to protect and enhance Indian resources. I don't have any disagreement with that, and tribal self-government.

Under what case law or under what law, other than perhaps the Indian Reorganization Act, is there a requirement to enhance tribal self-government?

Mr. WILKINSON. Reed Chambers, in an article, concluded that there probably is now a subject duty. We recommend clarifying that because we believe that trust law in some areas is unclear.

Now, we believe that it should not become an overly specific kind of statute, but this is clarifying the existence or nonexistence of that principle.

Mr. MEEDS. Reed Chambers believes it exists, but why does he believe it exists? What it premised on?

Mr. PARKER. Congressman Meeds, in a discussion this morning, we spent some time focusing on this concept. We had started out recognizing that there is a variety of opinion as to the nature and mention of the trust responsibility.

Currently, Federal officials, the Justice Department, and Interior Department would like to formalize the narrower or restrictive interpretation which they attempt to pursue, which would confine the notion of the trust responsibility as a legal obligation, as one which applies liability to breach and so on.

To protection of natural resources, and as we pointed out, to the consensus of opinion in Indian country is clearly that trust responsibility is much more an inclusive concept. This proposal is a proposal basically to formalize the inclusive concept as a congressional principle growing out of this Commission as a finding.

Now, in terms of support for that proposition, I feel the support primarily is a basis for logic. We can make logical arguments which I feel are persuasive, that trust responsibility is a primary responsibility to insure the survival and preservation of Indian tribes, and necessarily includes their governments.

The area of trust law is an area of Indian law which has not seen much development, and I think Charlie will agree with me over the years. Primarily, the reason for that is we haven't had a vigorous advocate in the Interior and Justice Departments attempting to pursue the development of this law, so that we would now be able to sit back and see an impressive list of legal precedents which would have come to the same conclusion.

But, on the other hand, what legal authority and precedents that do exist don't confine the trust responsibility to the natural resources in a manner that Justice and Interior Department officials would like to see.

Mr. MEEDS. Can you tell me of any case law, or any statute, which states that there is an obligation by the Federal Government to enhance triba self-government?

Mr. YATES. Will the gentleman yield? I am reading from Reid Chambers' article and it says this on page 1219, after outlining the two leading cases, and decisions by Judge Marshall's the *Cherokee Nation* v. *Georgia* and *Worcester* v. *Georgia*.

It says here the Machiavellian guardianship of trust responsibility can also be viewed as an expensive protection of the tribe status as self-governing entity as well as these property rights.

The Federal Government guaranteeing and recognizing the sort of protective status of the tribes, securing to them the power of managing their internal affairs in an autonomous manner except for a congressional power to regulate trade, moreover tribal autonomy is supported by a Federal duty to protect the tribe's lands and resource base.

So you have these two original cases that sustain——

Mr. MEEDS. That is how Reid Chambers interprets this. There is this obligation.

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Mr. YATES. He says this is what the cases say; yes.

Mr. TAYLOR. I have a few further comments on this. First of all, I agree completely with what Alan has just said. I agree also with Reid Chamber's analysis of those two cases.

But, in addition, I know of no case that has specifically said that there is a trust responsibility of the Federal Government to protect and enhance tribal government. But many cases have been in the courts with the support of the Department of the Interior and Department of Justice protecting jurisdictional aspects.

I think *McClanahan* v. *Arizona Tax Commission* is an example for the protection side, was to protect an individual Indian on the Navajo Reservation from the application of State tax laws. That did not involve a natural resource, it involved jurisdiction.

The Department of Justice supported the tribal position in the treaties. Almost every treaty that was ever negotiated, that I know of, the tribes placed themselves under the protection of the U.S. Government.

It is a weak sovereign placing itself under the protection of a powerful sovereign. The principles of international law that applied in the early case decisions—those treaty obligations are to protect the Government, the people, and the resources and I don't think there would be any difficulty at all in building a very fine legal brief on this.

But there is case after case where the Departments of the Justice and Interior have been heard protecting the jurisdictional aspects of the tribes.

Mr. MEEDS. I understand that, I don't view those as the same as enhancing tribal self-government, however.

Mr. TAYLOR. Well, if it is protection of self-government, that certainly is a very close parallel to enhancement.

Mr. WILKINSON. Congressman Meeds, I think it is clear we are not suggesting that this is ironclad case law. This is not a statement of existing law, this is a proposed recommendation for this Commission.

Mr. MEEDS. It may not be a bad policy, I am not disagreeing with that, but to make it an obligation is different than to state it as policy.

Mr. WILKINSON. Well, it would be an obligation, but to adopt principle No. 1, it seems to me the issue is not whether it is existing or you would be making law here, or recognizing it. I think very likely you may just be recognizing existing law, you are clarifying it, and taking our suggestions a step further.

Mr. MEEDS. I agree with that.

Mr. YATES. Again from Reid Chambers, his opinion to the solicitor general: "A prime call of any political trusteeship is a substantial measure of self-determination and the beneficiary of the trust, the President's message"—referring to Nixon's 1970 message recognizing this for an essential goal as maximizing Indian self-determination—"as I perceive such self-determination is not logically inconsistent with enforcement trust responsibility."

Indeed, this could be regarded as a means toward achieving the self-determination objective, according to the power to speak of the guarantee of self-government, but also protecting the land base over which tribal authorities should be exercised.

"Water to make that land—hunting and fishing rights to sustain the tribal population, et cetera. True, other aspects of the trust

responsibility may limit quantitatively the extent of self-determination." We are talking about sovereignty now.

But in that sense a tribe may bear a relationship to the United States, somewhat similar to that of a municipality to a State government. Each has recognized sovereign powers, execpt as specifically preempted by the legislature.

In other words the sovereignty that an Indian tribe may have may be of a very limited nature, but it is still a kind of a sovereignty. It may not be as much as a city, it may not be as much as a State, certainly it is not as much as the Federal Government, but it is a governmental entity which has enjoyed a certain amount of sovereignty.

I think that our friend, in his opinion, pointed out a list of the kinds of sovereignty that an Indian tribe would enjoy. For instance the marital right over its own people, for example, or some taxing rights over its own people. There is a whole list of them, I don't remember the exact location but he's got them listed there.

To that extent the tribe enjoys what is known as a sovereignty. It doesn't begin to compare with something like the Federal Government, probably not as much as a State, perhaps. But it does contain sufficient sticks in that bundle of sticks known as sovereignty to have that kind of a title. And that is why I think our staff was willing to put that first point in. Is that correct?

Mr. ALEXANDER. Yes. Just to clarify what Paul said it did: It is not that we are saying it is the most definitive statement of the law, but what we are recommending is clearly supportable. As Peter said, a very good case can be made for it and that is important.

It is not that we are saying of determining a system, we are saying there is some ambiguity, but a clear, good case can be made for the principle that we have recommended, and your point is well taken.

Mr. YATES. What page is that list of sovereignty on, Charlie?

Mr. WILKINSON. I think it starts at note 9. Yes, it starts at note 9, the seventh page.

Mr. MEEDS. I don't conceive that we are presently discussing sovereignty, although perhaps we are.

Mr. YATES. I thought the self-determination question of enhancing—what was the phrase we were using—self-government was implicit in the question of sovereignty.

Mr. MEEDS. It would be some portions of self-government.

Mr. YATES. That is right, that is why I thought I would bring that up.

Mr. MEEDS. It is my understanding we have already discussed sovereignty.

Chairman ABOUREZK. Yes; unless you want to bring something else up.

Is there any other discussion on any of these principles?

Mr. YATES. Why is No. 6 necessary?

Chairman ABOUREZK. Would the staff like to explain that?

Mr. YATES. It seems too obvious—I wonder why it is necessary?

Mr. HALL. I don't think it is that obvious. It is our feeling it is not that obvious to an awful lot of people in the States and in the executive branch as well. It is merely a reaffirmation because legal title rests in the Federal Government does not mean that they have complete control over that.

There is another legal interest in those Indian lands that is recognized, and that is the beneficial interest. My feeling is that if this concept had been fully understood one of the things that is mentioned later on in this chapter with respect to the application in NEPA on Indian trust lands perhaps the court might not have come out that way.

It is fully understood that we are not talking about public lands. Indian lands are not public lands. The legal title only rests with the U.S. Government. In that case, however, they treated them as if they were public lands, and in some of the water cases as well.

Chairman ABOUREZK. That particular principle: How would you state that in a recommendation for No. 6?

Mr. WILKINSON. Senator Abourezk, in response to that, I want to mention task force nine's report, which deals with this issue, and has not been mentioned much. I think it should be the recommendation of the staff that the entire task force nine report, which is a revision of 25 U.S.C., be sent to committee for consideration.

The concept, of course, in the task force nine report—the law revision report—is to put it in the statute in a more comprehensible manner. The idea would be that this might become 25 U.S.C. 1. This kind of section would be to lay out the most basic Indian law principles dealing with the trust relationships.

So I think we would see it that way.

Chairman ABOUREZK. That is all I am asking—that you state specifically what it is.

Is there any other discussion on this?

Mr. MEEDS. I would like to address a question to the staff on principle 2, trust responsibility as through the tribe to the Indian individual, where he or she may be.

Now, I think I agree with that, as I understand it. Does it mean that if there are members of the tribe who no longer reside on the reservation, who is no longer a member of a tribe who is functioning in the society other than as a member of the tribe. Does the trust responsibility still extend to him?

Mr. YATES. Mr. Chairman, may I ask a clarifying question? When does he not become a member of the tribe? Does he terminate absolutely?

Mr. MEEDS. Well, probably, at the time he or she leaves the reservation. But let's assume that he does, and if you are a Yakima and you don't live on the reservation, do certain other things, you are not a member of the tribe any longer.

You know, there are a number of ways tribes usually establish the requirements of membership, and let's assume that in moving to the city or moving away from the reservation that the individual is no longer a member of that tribe.

My question now is: Does the trust responsibility still extend to that person?

Mr. WILKINSON. I think not. Assuming the person is not a member of the tribe.

Mr. MEEDS. That does not?

Mr. WILKINSON. Does not extend.

Chairman ABOUREZK. May I then make a suggestion? I think that is an excellent point. I think that ought to be changed to read "the

trust responsibility extends through the tribe to the individual member of the tribe" rather than "the Indian individual, whether on or off the reservation." We have already changed that but I think that clarifies it a great deal—by stating member of the tribe and letting the tribes define their members.

Mr. WHARTON. I wanted to clarify one thing. We are making a lot of assumptions and one of them was that if an individual leaves the reservation they are no longer a member of the tribe. It is not necessarily true.

Mr. MEEDS. No; I am not assuming that. What I am assuming is that the person—and again I think the tribes have to define their own membership—if the person has done something either specifically, renounced his tribal membership or done some act which the tribe considers under their rules to renounce that membership. I agree then with what you say here because I think the trust responsibility runs to tribes through treaties and executive agreements and other things, to tribes, and only to the individuals through the tribes. That is the point I was trying to make.

Commissioner WHITECROW. May I elaborate just a little bit on this, Mr. Chairman. I think Congressman Meeds, what you are talking about is you are referring to an individual here who may have abrogated his citizenship within an Indian tribe, and then departed the area.

As an example moving into an urban area, and then taking advantage of the many funds that are currently available as a result of being an Indian. And in actuality by the trust definition here would not be eligible for any services provided.

Now, is this what we are talking about?

Mr. MEEDS. I am not putting it on the basis of services, I am putting it on the basis of tribal membership. In a definition of the trust responsibility, I think it follows through the tribe. It doesn't flow to the individual Indian except through his or her membership in the tribe.

I think as the present state of the law, and I am just trying to make sure that this is just not anything different than I thought it was, and as they described it, it is not.

Commissioner WHITECROW. As I understand our present situation, we do have an awful lot of people who are receiving services and are not necessarily affiliated with the tribes or are not necessarily tribal members.

Mr. MEEDS. I don't know that that is bad. What we are talking about here is an obligational trust responsibility, again.

Mr. TAYLOR. Perhaps we should be saying that the trust responsibility runs through the tribe to the individual, but services are not necessarily limited.

Mr. MEEDS. That is right. You give a lot of people services where there is no trust responsibility.

Mr. TAYLOR. I would just point out, as sort of support for the observation, is the problem with terminating Indians. It is a very interesting situation where a fellow is an Indian at one time and then all of a sudden he is not an Indian, and then all of a sudden he is an Indian.

I am sure the policy can't be based on that sort of vacillation. So I agree with the basic statement that is here, but services should not be limited only to those people.

Mr. MEEDS. Are there futher questions or discussion on the findings and recommendations of principles 1 through 6?

Chairman ABOUREZK. What was your question?

Mr. MEEDS. We are now prepared to proceed, Mr. Chairman.

Mr. WHARTON. I would ask if we resolved No. 6?

Chairman ABOUREZK. For my own purposes you did; yes.

Mr. WHARTON. The only change that I would suggest is that we change trust lands to trust properties, so it would cover things like water and natural resources—principle No. 6.

Mr. YATES. Yes.

Chairman ABOUREZK. What is your next series, then?

Mr. YATES. You ought to be uniform about the United States or the Federal Government now.

Mr. HALL. Yes. That with the exception of principle 4—which is going to take some additional drafting with the amendments which have been made—can we assume that 1 through 3 and 5 and 6 are adopted in terms of us proceeding with those?

Chairman ABOUREZK. Well, they are adopted in terms of principles. The Commission apparently ascribes to them. I don't know if you want to have a formal vote on that. Do you think you need that?

All right, they are adopted in terms, but I want to reiterate that I would hope your final recommendations don't come out in that form. I hope you will be very specific in your directives to the Congress to do what your recommendations say they ought to.

Mr. YATES. The principles are adopted in principle.

Chairman ABOUREZK. In principle, that is right.

Mr. MEEDS. We are not voting at this time.

Mr. YATES. Just adopting the principle.

Chairman ABOUREZK. Well, if nobody disagrees.

Mr. MEEDS. Well, Mr. Chairman, I do disagree with 1 and 2, and the places I have stated, and with that part of 4 which I disagree with.

Chairman ABOUREZK. Does anybody else disagree?

Let's just have a voice vote on principle No. 1. All those who agree with it say aye.

[Chorus of ayes.]

Chairman ABOUREZK. Opposed?

Principle No. 2: All those in favor say aye.

[Chorus of ayes.]

Chairman ABOUREZK. Principle No. 3: All in favor say aye.

[Chorus of ayes.]

Chairman ABOUREZK. Those opposed?

Principle No. 4: Same sign, as modified—everything is as modified.

Mr. MEEDS. And is it modified requiring affirmative action on the part of the Congress?

Chairman ABOUREZK. Yes.

Mr. MEEDS. Very well.

Chairman ABOUREZK. All those in favor will say aye.

[Chorus of ayes.]

Chairman ABOUREZK. Opposed?

Principle No. 5: All these in favor will say aye.

[Chorus of ayes.]

Chairman ABOUREZK. Opposed?

Principle No. 6: All those in favor will say aye.

[Chorus of ayes.]

Chairman ABOUREZK. And those opposed?

Mr. YATES. Mr. Chairman, this is subject to final language?

Chairman ABOUREZK. Oh, yes, absolutely. We reserve the right, right up to the last minute, to have final approval. That is understood through all of this.

Lloyd, I assume on these that you will want to have minority views on each and every one of them.

Mr. MEEDS. Yes.

Mr. YATES. Mr. Meeds, are you going to offer substitutes for 1 and 2 on the ones on which you voted no on? Do you want to reserve that possibility?

Mr. MEEDS. Possibly, yes, possibly.

Chairman ABOUREZK. That is fine.

Mr. YATES. When are they going to come in with the final drafts?

Mr. ALEXANDER. February 3, 4, and 5.

Mr. YATES. Maybe you want to come in with your recommendations at that time, inasmuch as we haven't agreed on final.

Mr. WILKINSON. Mr. Chairman, just in terms of staff redrafting, I wasn't sure on No. 4. Congressman Meeds, your objection, you said that the affirmative congressional action—as I understood the redraft of the proposal there—would be both an express act plus congressional approval. An impact statement there would just be a one step process?

Mr. MEEDS. As I understand it, the agency or department which proposes to abrogate the treaty or to take lands or whatever, would come in with an impact statement, which I think is a good idea.

But that upon presenting that statement it would be necessary for the Congress to enact a specific act in condemning or abrogating or whatever. I am saying that what ought to be done is that it should be brought before Congress and if Congress doesn't take action within a certain time frame then they should be able to proceed.

Mr. YATES. At that point Congress would either finally approve the legislation or kick it out—it is one of two choices there.

Chairman ABOUREZK. Lloyd is arguing for a congressional veto provision, and we are arguing for affirmative action before.

Mr. YATES. Before giving the go ahead.

Chairman ABOUREZK. Lloyd says the Corps of Engineers can go ahead unless the Congress vetoes it. We say they can't go ahead unless Congress approves.

The argument, on the part of the staff, is that a greater burden of proof should be required, or a greater burden should be placed on those who want to abrogate the treaty rights.

Therefore, it should require an affirmative action before Congress, and that is the argument that swayed me.

Mr. YATES. There is also the possibility, Mr. Chairman, that in respect to this, the taking may go ahead if it does not require the taking of any portion of the Indian property.

Chairman ABOUREZK. Absolutely.

Mr. YATES. So this is just limited to the impact on Indian property.

Chairman ABOUREZK. Yes.

It is not only just Indian property, it is anything that would abrogate—I mean you could take Indian property conceivably if it did not affect trust status or treaty status.

Mr. YATES. Like what? What is an example of that?

Mr. HALL. Fee simple land.

Chairman ABOUREZK. Tribal owned land or individually Indian owned land. There would be no impact statement required on that.

Mr. YATES. For tribal land?

Chairman ABOUREZK. If the tribe owns land and it was fee simple, that could happen.

Mr. YATES. I don't understand this. Give me an example of how this would work.

Chairman ABOUREZK. Well, if the tribe got ahold of some money and bought some land and did not put it in trust.

Mr. YATES. OK, this is just the trust part that we are talking about.

Chairman ABOUREZK. Right.

Commissioner BORBRIDGE. Mr. Chairman, what would happen then if we take a look at some of the consequences under development of the Alaska Native Claims Settlement Act lands in which there are 40 million acres of land and at least during a period of time lasting 20 years, due to be up in 1991.

The Alaska Natives would argue that there is an element, perhaps not sharply defined, of a trust status. After that time the land would be alienable, although in fact still in the ownership and fee simple of an identifiable use by the Alaska Natives.

Chairman ABOUREZK. Is it in fee simple at this time?

Commissioner BORBRIDGE. It would be in fee simple. During the process of the exercise by the sovereign, its right to extinguish any title to certain lands.

Chairman ABOUREZK. I don't understand that.

Commissioner BORBRIDGE. I am a little concerned about a broad statement which may have a very serious impact on 40 million acres of Alaska Native held land. This would be land that was not acquired by the tribe but rather was an incident to the exercise by the power of the right to extinguish aboriginal title.

Chairman ABOUREZK. What I don't understand is: Is the land held by Alaska Native corporations in trust or is it in fee simple?

Commissioner BORBRIDGE. It is in fee simple.

Chairman ABOUREZK. Today?

Commissioner BORBRIDGE. Yes. There would be one difference and that is between now and 1991.

Mr. MEEDS. That is correct.

Chairman ABOUREZK. It is in a form of trust, isn't it?

Mr. ALEXANDER. Yes; it is.

Commissioner BORBRIDGE. This is what we would view it as, as a nature of a trust relationship during this period of time.

Chairman ABOUREZK. It is not alienable—sure it is.

Mr. ALEXANDER. After 1991 that land becomes fee simple, and absolute title held by State chartered corporations whose stock can be owned by anyone.

Chairman ABOUREZK. It is not trust and it is not treaty land. So I think you are safe until 1991.

Commissioner BORBRIDGE. I would reserve comment until after 1991.

Chairman ABOUREZK. I am not saying the Commission would still be in existence in 1991.

Commissioner WHITECROW. Mr. Chairman, I would like to point this out. As you recall, Commissioner Borbridge, I suggested at our last meeting, be sure and check out to determine whether or not you have provided for the continuation of your land ownership in the State of Alaska. I pointed out we, in Oklahoma, found out what that was all about.

Commissioner BORBRIDGE. I am all for it.

Mr. ALEXANDER. The next set of recommendations, which are the special problems, are 3 pages.

Mr. YATES. Where are you?

Mr. ALEXANDER. I am in the trust chapter. Turn three pages over and you will be on the trust chapter.

Mr. HALL. The four items and special problems are four rather specific ones, that flow out of the previous discussion with regard to trust and principles. First is a recognition of the fact that frequently Indians have rights which are not enforced because of lack of sufficient representation.

It is also a recognition, of course, of the conflict of interest which is so well documented, with the Interior and Justice Departments. It makes it a little bit more easy for the tribe to secure private representation when it is pursuing trust rights, than is currently the case.

Chairman ABOUREZK. Is there a recommendation anywhere in the missing chapters for trust council authority?

Mr. HALL. Yes, there is, that is in the Federal administration section.

Chairman ABOUREZK. Isn't this redundant to that?

Mr. HALL. Not really, no. Like, for example, A and B. A would not be redundant at all regardless of what took place in a Federal reorganization of some sort. That merely gives Federal courts the authority to grant attorney fees, which is done now in many, many cases, and specific exceptions to that general rule is followed by the Federal courts.

Chairman ABOUREZK. You are leaning to the discretion of the court.

Mr. HALL. That is correct. It is merely giving the court authority to grant it.

Chairman ABOUREZK. You are right.

Mr. HALL. And B is also something which to some extent is going on currently with BIA—advancing litigation moneys to tribes under certain circumstances. That is intended to loosen that up a little bit—make it a little bit more available.

Chairman ABOUREZK. Are you leaving that to the discretion of the Department of the Interior?

Mr. HALL. That is correct. C is where the differences come. This would change also, of course, dependent upon what we did with respect to the trust council authority, or an independent agency, or whatever.

It states flat out, it is intended to short circuit those situations in which a tribe or an Indian individual feels that his trust rights are being infringed upon and he cannot get Interior or Justice to go along with that and can't represent him or will not represent him, and he doesn't have the resources to do so himself.

Chairman ABOUREZK. This is redundant to the trust council authority.

Mr. HALL. That is right, if there is trust council authority adopted presumably. This mandatory duty, of some sort or another, would be shifted over to that trust council authority. I would say, actually, it is like they were talking about this yesterday, it is quite likely that this particular section doesn't belong in the trust relationship chapter. Perhaps it should be moved back into the chapter where we were talking about trust council authority.

Chairman ABOUREZK. I think you are right.

Mr. YATES. Aren't we in trouble on this section? The Department of Justice is in a most anomalous position now, and all because it may be representing an Indian group in connection with some property right, and yet that claim may be advanced against the Department of the Interior or Bureau of Mines or some other Government agency which is represented by the Department of Justice as well.

Now, do you propose to say that the Department of Justice shall represent the Indians under any and all circumstances and the Bureau of Mines shall find lawyers somewhere else, or that Interior shall find lawyers somewhere else?

Mr. HALL. No; it is worded that they would represent Indians or Indian tribes when there is a reasonable legal basis for doing so. However, what you are referring to is that further on down at B and C says that if Justice declines to represent the Indians, and that is presumably the action they would take when the conflict is so stringent or so obvious in a situation like this.

Mr. YATES. The problem is that under the present law the Interior Department has to go to the Department of Justice as its lawyer.

Mr. HALL. That is correct but further on down you see if Justice declines, the way this is worded, the Department of the Interior would have the authority to do so. Now, obviously the Department of the Interior does not have litigation powers. If that language were to change also, because I have a parenthetical here, as other agency with authority to litigate.

Chairman ABOUREZK. Why do you want to put in a whole new procedure when we are going to recommend trust council authority without question? And without question it will be passed by Congress.

It was well on its way a couple of years ago and we decided to hold on until we get into this Commission study and wait for a better look at it, with the Commission. There clearly is not much opposition to it at the time so why do you want to put this alternate procedure in?

Mr. ALEXANDER. One of the criticisms of the trust council authority, as constituted in the proposals, is that the entire weight of the Department of Justice, which is substantial, just the fact that it is the Department of Justice, leaving aside the numbers of lawyers, the research services available to it are really significant.

The Department of Justice should be required, where it can, to represent Indian interests. In a sense, the way this number C is written——

Chairman ABOUREZK. May I break in? One of the parts of the trust council bill, as I recall it, as we worked it out in the hearings, was that trust council authority would be a small group representing only conflict cases, and that Justice would represent all others.

Mr. ALEXANDER. This in fact incorporates that type of procedure.

Chairman ABOUREZK. It doesn't, it shifts it from Justice over to some other agency.

Mr. ALEXANDER. The reason that it says "Department of the Interior or other agency authority to litigate" is that that paragraph contemplates the trust council authority, and in the failure of that it should be——

Chairman ABOUREZK. It would seem to me that you would strike this paragraph out of this section. Put it in with the trust council authority section, but modify this part by saying that the trust council will represent all cases of conflict of interest within the Government. That other cases the Justice Department shall be required to prosecute on behalf of the Indians, when there is no conflict they will do it, if they are directed to. Do you agree or disagree?

Mr. ALEXANDER. I agree they will do it. There is some serious problem, as most of us are familiar with, in how the Justice Department has carried out its responsibilities.

Chairman ABOUREZK. There is not another law that is going to change that. He won't change that with a further statutory correction.

Mr. YATES. He can't have it both ways. He wants the Department of Justice and he says they don't do a good job.

Mr. ALEXANDER. There are specific situations where they have not done a good job, which is why we do want the attorney's fees in here so that the tribes can be protected.

Mr. YATES. Why don't you tie it into your first one some way by saying that if the Department of Justice turns it down the court will appoint an attorney and provide for a special fund somewhere for the payment of attorney's fees?

Mr. ALEXANDER. It is not just the issue of the Department of Justice, when you get down to it. It is the Department of Justice going into a case and not truly or totally advocating the Indian position, and the Indian tribe feels the necessity to have counsel come in and protect its own interest.

There are at least two current cases where this is going on, which are well documented.

Mr. YATES. Why do you want the Department of Justice?

Mr. ALEXANDER. That is not the situation in all cases. In some situations, and many situations, they can provide adequate legal representation. We are never going to cure the problems of how individuals lack in the framework of their responsibilities. We are just suggesting an additional out for the Indian tribes because it does eat up an enormous amount of resources.

The Colvilles are in court on the *Walton* water case with their own counsel and the Department of Justice is somewhere between them and the defendants on the case.

Mr. YATES. What is it you want to say, then? The Department of Justice shall do a good job in representing the Indians?

Mr. ALEXANDER. And how do we enforce that?

Mr. YATES. Yes. Now, you want it both ways. I don't think you can do it.

Mr. WILKINSON. This C, Congressman Yates, is important because it provides a standard for measuring the discretion of the Justice Department and permits judicial review. In other words, if the Justice

Department turns down a case without reasonable legal basis, the tribe would be permitted to obtain judicial review under the Administrative Procedure Act, and the burden would be on the Justice Department.

This section is not intended to get the problem of Justice not being good attorneys but turning down cases which they should take.

Mr. YATES. But you are back again to the kind of representation that Paul doesn't like. If they don't want to handle a case, they will take it and won't give a good representation, and then what do you do?

Mr. WILKINSON. The tribe would have to analyze that situation and make its own decision.

Mr. YATES. That isn't what this says, it says: "The Justice Department has a mandatory duty to represent Indians or Indian tribes."

Mr. WILKINSON. But the tribe doesn't have to seek the benefit from that duty, it could obtain its own counsel.

Mr. YATES. Where does it say that?

Mr. WILKINSON. In A, "a tribe can always have its own counsel."

Mr. YATES. Yes, but A only grants attorneys fees if they win.

Mr. WILKINSON. I don't think there is any question that Indian tribes have authority to hire their own attorneys.

Mr. YATES. I don't see anywhere in here where the Indians have the option of either having Justice or their own lawyers. Is there anywhere in these three paragraphs any statement to that effect?

Mr. TAYLOR. I don't believe the writing in here does specifically provide that, Mr. Yates, I think it should be added to it.

In the cases that Paul alluded to, the two ongoing cases, at least one of them was with the Department of the Interior, requesting the Department of Justice to file a suit in the name of the tribe over the opposition of the tribe, which specifically requested that the suit not be filed.

In fact, an examination of the record in that case will show that defense counsel was asking Justice to file the suit, so that a court would acquire jurisdiction over a tribe.

Mr. YATES. Then you want to revise C. If you want to give the tribes the option of hiring their own lawyer, or of using the Department of Justice, you ought to say so. This doesn't say that.

All this says is that Justice shall represent them, or tell why they refuse to do so.

Commissioner WHITECROW. I would like to ask this: If, in the event the Interior Department found that it had a conflict of interest in representing a tribe—say against a Corp of Engineers project—would it not be more beneficial here, such as Congressman Yates suggested, to allow funds to be available to pay for court appointed attorneys for the tribe in that specific case.

Let me elaborate on this a little further. Say we have an abrogation of a treaty, a violation of trust authority and responsibility, as in my previous statement, in regard to failure of a Federal employee to fulfill trust responsibility in stopping the cutting of wood on tribal land.

The tribe requested the Bureau of Indian Affairs to enforce and the Bureau fails to enforce, the Justice Department fails to enforce: What recourse does the tribe have when they have no funds to pay for attorney fees?

Mr. HALL. The tribe, of course, always has the power to secure its own attorney.

Commissioner WHITECROW. If they have the money to pay for legal services.

Mr. HALL. A is they secure their own attorney and go to court, and if they are successful then the court may award attorney fees to the tribe.

B is that they can go to BIA prior to litigation, and secure funds, as is done in some cases right now to prosecute that case. It seems to me that Congressman Yates' comment is well taken. Perhaps it might clarify if we just added in that first sentence that the department has that mandatory duty upon request of the tribe.

And that clearly leaves the option to the tribe as to whether they want Justice to come in or not.

Mr. YATES. Suppose Justice turns them down?

Mr. HALL. If Justice turns them down, they have to have a reasonable legal basis for doing so.

Mr. YATES. The thing that appalls me about that kind of a situation is that Justice won't turn them down if they have to explain why, but they may not give them a good representation, and I think the Indians would lose under those circumstances.

I think it would be fine if you just provided in here for some agency, whether it be Justice or the court, or your new tribal counsel or BIA, or somebody, to provide the attorney fees for taking suits that have a reasonable basis to court.

Let the Indian tribe hire its own lawyer.

I know this doesn't answer Paul's criticism or Paul's desire to have the powers of the Justice Department helping him, but if Justice doesn't want to help him they are in trouble.

Mr. HALL. There you could end up with a situation where Justice would never be involved in trust litigation like that, assuming there were enough funds available for the tribe to hire someone else.

Mr. YATES. You don't want the Justice Department if the Indians don't want them, do you? What you want to do is give the Indian people the right to select their own lawyers.

Mr. HALL. Yes.

Mr. YATES. Let me ask you another question. What about the other people that go to court trial: The economists, the auditors, and the paramilitary groups? You don't say anything about them in here.

How about other costs? How about preparation of the case? You are just providing for lawyers' fees, aren't you?

Mr. HALL. Costs in AB says attorney fees.

Mr. YATES. What does cost mean?

Mr. PARKER. It means litigation expenses.

Mr. YATES. All litigation expenses or just the filing fees?

Mr. PARKER. All litigation fees.

Mr. HALL. That could certainly be clarified, by adding all litigation.

Mr. YATES. Yes, but No. 2 doesn't talk about cost, 2 talks about anticipated attorney fees.

Mr. HALL. Yes. Both of them should say the same thing.

Mr. WILKINSON. I believe that is an open question, as Congressman Yates has indicated, as to whether expert witness fees are included within costs, I think this should mention attorneys' fees, expert witness fees, and other costs of litigation.

Mr. YATES. Your water rights cases, I assume, have enormous costs of various kinds? Perhaps you ought to itemize what those are, including but not limited to something like that.

Mr. TAYLOR. Cases will arise in which the United States is not a party to a lawsuit, or not involved in it, and we have a question of award of attorney fees, and the costs.

The other thing is it would be awarded against the United States rather than the adverse party. I am not sure Congress would, for example, have the power to authorize a Federal judge to award the kind of costs we are thinking about against a State government. There may be a constitutional problem.

What we are talking about is awarding these costs against the United States so it would be paid out of the U.S. Treasury.

Mr. YATES. That is one possibility. Another thing that occurs to me: Suppose there is a case in which the Indian tribe isn't directly interested but the effect of which may bear upon their tribe.

What about an amicus curii case? Is that covered by your language here, by fees for such a case?

Mr. HALL. No.

Mr. YATES. Suppose there is a lawsuit which may very well bear upon an ownership question of the Indian people, but they have no justiciable case, so they can't bring a suit. But they may want to intervene as an amicus.

Shouldn't that be covered by something here?

Mr. PARKER. It could be by certain language to the effect the Justice Department has a duty to provide representation for tribes who have a reasonable legal basis for litigation or other significant interests.

Mr. YATES. And which may bear upon the protection of the trust rights. You don't say to enforce that trust right, but which may bear upon, which is generally enough to commit them.

Mr. MEEDS. Are there further questions?

Commissioner DIAL. I have a question for Congressman Yates.

Mr. Yates, suppose the tribe sues for recognition. What happens——

Mr. YATES. With due respect, you had better talk to people who know more than I.

What is it you want to know, Adolph, whether they get fees?

Commissioner DIAL. What about the fees, yes.

Mr. WILKINSON. I think it has to be expressed, I think it must provide that costs could be awarded against the United States or any other parties, so that should be made express.

Commissioner DIAL. Yes, I want this expressed in this.

Mr. YATES. Mr. Dial raises a very important point. What are possible controversies besides the protection of trust rights and recognition by the Federal Government.

Are there other possible sources of litigation which ought to be itemized, other than trust rights?

Mr. ALEXANDER. What Peter mentioned before and which the United States has litigated for Indian tribes, are various jurisdictional issues which perhaps will be major areas of litigation in the coming years.

In relation to Mr. Dial's point: No. A would cover recognition suits because of its protecting or enforcing the trust relationship, if you are successful. But the point that needs to be made with Federal recogni-

tion is being treated separately and specifically being dealt with in terms of attorneys' fees, research cost, mechanisms, and procedures. So it is being treated in a very separate area, as we have discussed.

Commissioner DIAL. But I believe you need to say a little more. I am not so sure you would need all kinds of implied powers there, to make sure that you had some attorney fees, for a tribe suing for recognition, who we'll say wins their case.

Mr. YATES. I think Mr. Dial is right, I'm not sure that the question of payment of attorney fees should be in the trust section necessarily. I think that there are possibly other sources of litigation that may be in a special section, rather than a special problem and trust only covering all kinds of cases in which the Indian people may need representation.

So that you may want to put it in another area. I think you raised a good point, Adolph.

Commissioner DIAL. It seems to me that Pandora's box would be opened here for someone to say you have no trust responsibility, and yet he is suing for his recognition and trying to show that there is a trust responsibility. You see. And what happens?

Mr. HALL. You have to place some standards on it, otherwise the Federal Government may be in the position of guaranteeing attorney fees for any and every purpose. You have to put a limitation somewhere.

Commissioner DIAL. They would probably have to set up their own standards by a board of review or something, and cut out the useless cases.

Mr. MEEDS. Are there further questions with regard to the matter of legal fees?

Commissioner DIAL. What are we going to do about this?

Mr. HALL. If I might respond to this, it is clear that it needs some work. It was extracted from a couple of task force reports and placed in the trust because I wasn't sure whether it was dealt with anywhere else. But I think it probably should be.

So we will redraft it and move it for consideration.

Mr. MEEDS. All right, with that understanding we will now move to management of Indian trust funds. Questions with regard to any of the requests for——

Mr. HALL. Excuse me, sir, as you can see, all of these are very specific and deal with very, very detailed problems which generally all come from Pete Taylor's report.

Mr. MEEDS. May I ask some questions about this? ISSDA is——

Mr. TAYLOR. Mr. Meeds, there are various funds that are managed by this.

Mr. MEEDS. I understand that. What does ISSDA mean? What does IMPL mean?

Mr. TAYLOR. Indian money, not proceeds of labor. In the late 1800's they dropped the not out of the title by mistake and nobody has ever corrected it.

Mr. MEEDS. Why is this treated differently than tribal trust funds?

Mr. TAYLOR. I think the accounts are handled differently. There was legislation in the 1930's to authorize these funds to draw interest. In fact there is a direction to the U.S. executive agency to handle

the funds where they did draw interest. They are still not drawing interest today.

Mr. YATES. Why don't you say all Indian trust funds?

Mr. TAYLOR. I am not sure that these moneys are specifically trust funds. At least one of these accounts is not actually a trust fund, it is money derived on the reservation.

Alan, are you familiar with these different accounts?

Mr. PARKER. No.

Mr. TAYLOR. Essentially the recommendations here are existing law today, but they have been overridden by either administration neglect in the matter of, I believe, ISSDA accounts, or IMPL, I am not sure.

In one of the other accounts there is a specific direction that they draw interest, in a 1969 OMB directive to the Bureau of Indian Affairs, not to invest trust funds in certain Federal securities.

Mr. YATES. How much money is involved here?

Mr. TAYLOR. I believe one account was described as small and it carries $144 million, and I believe another one carries $29 million. There is a substantial amount of money involved.

Commissioner WHITECROW. This is separate from the IIA accounts?

Mr. TAYLOR. They are separate from what is normally considered the Indian trust fund, which are derived from sales of land or moneys paid in out of the leases, and things like that.

Mr. MEEDS. Can anyone tell us where these funds come from? What purposes they are to be used for, and why they are treated differently from other trust funds?

Mr. TAYLOR. First of all, if I could refer to task force No. 9's report, this is in part 6, chapter 6, and I will have to read you some of this material. It is derived from an interview with John Vale in the Albuquerque office, who is their financial investment specialist.

These are very technical terms and I will just have to read to you the description of these funds out of this report.

Mr. YATES. Who is John Vale?

Mr. TAYLOR. He is the investment officer for the Bureau of Indian Affairs.

All right, we have one account which is tribal trust funds. These are revenues from the sale or lease of trust resources, claims awards, judgment funds, and other payments made to tribes which are required by law to be deposited in the U.S. Treasury. This is tribal trust funds.

Other tribal funds derived from similar sources but which are not legally required to be deposited in the U.S. Treasury may be deposited in such trust funds at the tribe's option.

Now, we have the ISSDA funds, and/or invididual Indian money, which is called an IIM account. These accounts are primarily those funds of minors, adults under legal disability, income from tribal operating funds, income from individual trust land, and special deposits of advance contract payments from use of Indian natural resources.

Mr. YATES. May I ask a question? If, as you imply, the funds are not earning the same interest as other trust funds, is the Government liable to the trustee?

Mr. TAYLOR. There have been two cases on the subject, Mr. Yates. One was where an award of interest was against the U.S. Government.

It was a very small account, and I don't think the Government particularly responded to that.

There was a second case, I believe, in the Court of Claims.

Mr. YATES. Found against the Government as violating trust?

Mr. TAYLOR. Yes, by failure to invest the money at the rate of interest that could have been reasonably acquired.

Mr. YATES. I would think that somebody should tell the Secretary of the Treasury the potential liability here. They ought to be notified without waiting for this report to come out.

If there is that possibility, certainly the Secretary of the Treasury ought to know about it.

Mr. TAYLOR. I agree with you.

Mr. YATES. I think the staff ought to do it. If worse comes to worse I will even send him a letter myself.

Mr. TAYLOR. I would consider resigning and going into private practice if I saw this memo.

Mr. YATES. Do you need a partner?

Mr. BORBRIDGE. Mr. Chairman, under these recommendations, I assume this would take care not only of those funds which are trust funds, and therefore invest it, which would at least draw the minimum interest allowed by the United States, but it would also provide expressly for the reinvestment of the interest from the trust funds, which at least under previous policies have not been treated as trust money by the United States.

As a consequence, because of failure to promptly reinvest the interest, it just had not benefited the tribes the way it should have. I assume that is covered here expressly.

Mr. ALEXANDER. Interest shall be paid on accumulated interest in treasury accounts, or interest shall be credited to the corporate amount.

Commissioner BORBRIDGE. Is this altering, then, the view of the Federal Government as to what constitutes trust funds or are you saying that mechanically the interest on the interest should be taken out of the account and invested promptly elsewhere?

Mr. TAYLOR. Well, the interest should at least be put into the account to compound interest. It also could be taken out and invested. You could handle it either way.

Mr. YATES. Did anyone ever check with Norris Thompson to see whether or not he is paying any attention to this investment with BIA?

Mr. TAYLOR. Not to my knowledge, Mr. Yates.

Mr. YATES. I am kind of shocked by this. I would think that if this liability exists that somebody ought to be carrying over to the Treasury something about this.

Mr. TAYLOR. We learned of this through John Vale. It is based on a memorandum.

Mr. YATES. And John Vale is where?

Mr. TAYLOR. At the Albuquerque Bureau of Indian Affairs office.

Mr. YATES. And he has written a memorandum on this?

Mr. TAYLOR. Yes; I believe it is a part of a task force exhibit.

Mr. YATES. To whom?

Mr. TAYLOR. I will check. This point was checked after the notes were made, and the memorandum that was made was sent back to

him for review. A memorandum prepared by Mr. Vale is in fact incorporated in this task force 9 report as an exhibit to back up this memorandum.

Mr. YATES. No. 9?

Mr. TAYLOR. Yes.

Mr. YATES. Do we have an extra copy of that?

Mr. ALEXANDER. Yes.

Mr. YATES. Thank you, very much. I think that rather than waiting we ought to find out from Treasury why it isn't being done now.

Mr. TAYLOR. Well, our feeling on these recommendations, Mr. Yates, is that as Congress processes these they will be sent to appropriate agencies for comment, I would be very interested in seeing the Department of the Treasury's comments.

Mr. YATES. We ought to call Norris Thompson and find out why they aren't acquiring it for their accounts now. On the basis of what I read here, I think the director of BIA ought to be trying to obtain as much interest on these deposits as he can.

As a matter of fact, the thought occurred to me, as to why he should be accepting 4 percent simple interest.

Mr. TAYLOR. That is exactly the point of the *Pomo Band* case.

Mr. YATES. What is the citation of that case?

Mr. TAYLOR. Mr. Yates the citation to that is 363 Federal Supplement, page 1238.

Mr. YATES. Did that ever go up?

Mr. TAYLOR. No. The Northern District of California, 1973. There was a later case. Yes, there is a later case, Mr. Yates, in the U.S. Court of Claims, *The Cheyenne-Arapaho Tribes of Indians of Oklahoma* v. *the United States.*

Mr. YATES. Do you have a citation?

Mr. TAYLOR. Yes, 512, Federal second, 1390. That is Court of Claims, 1975. That may still be in the process of litigation. A legal point was determined by the court on that, reviewing all of the funds that we were talking about there, and the way in which they are handled. It was sent back down to a hearing examiner or a magistrate, whatever they use, to determine the amount of money involved in the case. So it may still be in litigation.

Mr. YATES. But they have held that same principle?

Mr. TAYLOR. Yes.

I am not positive they actually established liability.

Mr. WILKINSON. I think I should give you one other citation. *United States* v. *Mescalero Tribe*, 518 Federal second, 1309. That is a Court of Claims case, 1975, and goes the other way also on some points.

Commissioner WHITECROW. Mr. Chairman, I would like to ask the attorneys a question in regard to the possibility of this Commission making a recommendation of expanding the FDIC maximum insurance coverage on an account.

It is my understanding that at the present time $40,000 is the maximum amount that is covered under FDIC on any individual account. Now, to give you an example of what took place, and this was brought to my attention by the American National Indian Bank, a tribe had on deposit $3 million.

They had no concept to where this money was. They had a small inner tribal or a tribal enterprise underway whereby they were working toward trying to make a business self-sufficient, under tribal ownership. They needed $25,000 for operational money for their first 6 months.

They went to their local banks and were unable to get any assistance whatsoever. So they went to the American Indian National Bank and inquired insofar as the possibility of a loan.

The American Indian National Bank was under the same banking regulations that the local bankers were under, but they said, "We can't help you unless you have some collateral." And they said, "Well, we've got $3 million, and they said, "Well, if you've got $3 million, any bank in the country should be able to cover you. Where is your $3 million?"

And they said, "We don't know." They said, "Well find out and we will try to see what we can do to help you." So they found out. They found their $3 million on deposit in Tyler, Tex.

Now, that $3 million was not helping their local community whatsoever, but the community of Tyler, Tex., certainly was being helped by that money coming into their local economy.

Now, if we are really talking about making tribes self-sufficient, that money should also be available locally to help the Indians turn this money over and over within a community.

One of the regulations, of course, that stifles this kind of utilization of local funds, is this banking regulation that requires no more than $40,000 could be deposited in any one bank. The bank has to get bonds, dollar for dollar on every dollar over $40,000 that they bid on.

Therefore, only $40,000 is immediately available for lending in the local area. Your smaller banks are unable to utilize those funds because they cannot afford to buy those bonds.

Whereby, if we expanded the FDIC maximum deposit upon Indian trust money only, perhaps that money would be available to help their local economy. Local banks could bid on this money, and make the money available in the local community to help them.

In addition the tribe would receive interest on that money and would be able to borrow that money, locally. Now, this would entail, as I understand it, a change of legislation. It would require some new legislation amending old legislation.

We are here trying to make recommendations for change. I think this is a recommendation we certainly should look at very seriously.

Mr. YATES. There is something I don't understand. I look at page 708 of this task force report and the report by Vale. He talks about investments. The Act of 1938 authorized the Secretary of the Interior "to invest Indian tribal trust funds," et cetera, "are invested as follows."

Now, they have got a total invested of $542 million. This is page 709: "Per annum earnings, $47.1 million, average return 9.05 percent." Where is the 4 percent then that we are talking about; 9.05 percent doesn't seem to be an inadequate return.

And then you turn to page 710: "Investment by Bureau of Indian Affairs." They talk about interest rates per tribal trust fund of 9.19 percent, by ISSDA returned 8.66 percent, IMBL 8.64 percent, or overall return of 9.05 percent. That is pretty good.

Mr. TAYLOR. Yes; it is. These are procedures that Mr. Vale set up recently, in very recent years. No. 1: These funds are not drawing the interest that they are statutorily authorized to draw despite these figures here.

In the first place, the interest payments are not being made out of mere deposit in the Treasury. What BIA is asking is to withdraw these funds in the Treasury and invest them in Federal depository notes, Federal paper that is 100 percent guaranteed.

I guess a part of the problem that Jake is talking about, about the small banks not being able to buy in——

Mr. YATES. The point I am making is that I was outraged a few moments ago by this possible breach of trusteeship by the U.S. Government because I felt they were receiving only 4 percent or less on Indian trust funds.

The report of Mr. Vale, who talks about, incidently, earnings between July 1, 1974 and June 30, 1975, shows a return of 9.05 percent on invested money of $520 million.

Mr. TAYLOR. As I say, Mr. Yates, I think this is a rather new procedure that Mr. Vale has set up. That with the *Pomo* case there had been no investment made.

Mr. YATES. Instead of the paragraph that you have in, why don't we commend the BIA for having done that?

Mr. TAYLOR. In fact we did.

Mr. YATES. Where?

Mr. TAYLOR. In the report, we commend Mr. Vale for doing an excellent job within the limits that are imposed upon him.

Mr. YATES. Are there other funds, other than these listed in this report, that are not drawing the same amount of interest at the present time?

Mr. TAYLOR. Yes. The practice of the Treasury Department that had been followed, before they started taking these moneys out of there, was that no interest was being paid despite the statutes which had authorized and directed such interest payments in the 1950's.

The reason I say these funds, even now, are not earning the interest that they should earn, is Federal notes such as Farmers Home Administration, HUD, people like that, pay a higher interest rate than just a straight U.S. Treasury note. The statutes from the thirties were intended to authorize investment of tribal trust funds and those kinds of higher interest bearing notes.

The Office of Management and Budget in 1969, specifically directed the Bureau of Indian Affairs not to invest in those kind of notes because it created bookkeeping problems.

Mr. YATES. Then why do you have a statement in here: The current 4 percent simple interest being paid on Indian trust funds on deposit in the U.S. Treasury shall be increased through either a fixed interest, possibly 6 percent, or including interest rate?

If they are getting 9 percent on some of the securities why do we want them to get 6 percent?

Mr. TAYLOR. Well, we never know what the future holds for the interest rates. There may come a point where the tribes prefer the Bureau of Indian Affairs to have this money remain on deposit in the Treasury just as in a savings account. There ought to be a floating interest rate with a floor under it.

Mr. YATES. Right now the investment procedure favors the one the Bureau of Indian Affairs is following. You say in one paragraph:

"The BIA has a firm duty to attain the maximum available yield from each investment of Indian tribes." That is really all you want to say, isn't it?

Mr. TAYLOR. Let me think about that, sir. I would say that is probably correct.

Mr. YATES. This gave me the impression these funds were only earning 4 percent and you want to move it up to 6 percent, whereas, according to them, they are earning a very great deal more than that?

Mr. TAYLOR. By taking it out of Treasury.

Mr. YATES. That is right.

Then we don't have any criticism of them at the present time, do we?

Mr. TAYLOR. I don't agree with that at all.

Mr. YATES. What is your criticism currently?

Mr. TAYLOR. I criticize the Office of Management and Budget for specifically directing the Bureau of Indian Affairs to conduct itself in a manner that does not apply with trying to acquire the maximum money available under the legislation. They have countermanded an act of Congress.

Mr. YATES. Where is that?

Commissioner WHITECROW. Will the gentleman yield? While he is looking for that I would like to ask Mr. Ray Goetting to make some comments in regards to this interest rate and the management of money.

It is my understanding he has some history and expertise in this field.

Mr. YATES. Ray, with the approval of the chairman.

Mr. MEEDS. We are making great haste anyhow.

Mr. GOETTING. Actually, Congressman, the process of going from the date of collection to the deposit, through all the processes, that there is quite a delay and it is quite an operation. There is some advertising required to get bids on this money, and this sort of thing. It takes a lot of time.

And while it is on deposit, the funds stay on deposit for some length of time without any interest at all. It could be subject to the criticism we just made in the first place.

Second, there is the possibility that the investment of the money in the banks on or near the reservation area where this money belongs might benefit economically that tribe. I think this is the point that Jake is making.

So the management of the money is primarily for the benefit of the Indian people and the Indian tribes from which that money was collected, or it is primarily for the purpose of investment to raise more money. The interest on which the Bureau handles and puts it in as part of the appropriation activities, and shows on the appropriation request as moneys being furnished for Indian tribes, which really is their own money that is actually being given to them for spending in terms of the Bureau of Indian Affairs programs.

These kinds of things are the criticism. Not necessarily so much the amount of return on the money that is actually invested, through the process that Mr. Vale has, but their management of the overall operation for the benefit of Indians and Indian tribes—when it is their money.

I might add to that there are considerable amount of funds, that they have, and they don't even know what tribe they belong to.

Mr. YATES. How does the concept of self-determination and tribal sovereignty relate to this if, indeed, we support that concept as we

do in this report? Shouldn't we be requesting that the tribal funds be made available to the tribal management as promptly as possible?

Mr. TAYLOR. I think we probably will make such a recommendation in the chapter on economic development. That is one that is under the process of development right now. Those recommendations were also made in a report of task force No. 9, that tribes be given the option to place these funds where they want to place them.

Right now the Bureau of Indian Affairs considers itself under the trust law virtually an insurer of getting the highest rates possible. These notes turn over extremely rapidly and Vale is responding on 48-hour notice, buying notes that may draw interest for only 2 weeks, or 1 month, or something like that. He feels that he has an insurer's duty to get the maximum interest available.

Jake is raising the point the tribe would secure a great economic advantage, to themselves and their members, if they could place those funds in a local bank, for perhaps one-quarter, for less interest than they would be drawing.

Vale feels like he cannot authorize such a thing.

Commissioner WHITECROW. Let me elaborate on that for just a moment, Mr. Chairman. The small banks that I have talked with, in regard to this, have indicated that if there was a lifting of the maximum $40,000 limit they would be able to meet the high bid and then the tribe would have access to that money locally, and still receive the very maximum interest.

If we could just raise that maximum level.

Mr. GOETTING. It is the amount of collateral that is asked on it. For instance they have to give 100 percent collateral with a bid on it for the high rate. The small banks can pay the rate but they have to give the 100 percent collateral. It would take all of their other assets to cover it.

Mr. YATES. Don't we really want to redraft this series of recommendations then?

Mr. TAYLOR. In view of the conversation I would like to take a second look at it, particularly in light of your comment about the Bureau securing the highest possible interest.

These recommendations are rather detailed, it may be unnecessary.

Mr. MEEDS. May I just interrupt long enough to say: Consistent with prudent management of funds.

Mr. YATES. Right.

Mr. MEEDS. Obviously they might get 20 percent by investing it in some fly-by-night operation, which might be gone the next day. It might have flown that night.

Mr. TAYLOR. Are we going to take a break any time this afternoon?

Mr. MEEDS. We are about to adjourn until tomorrow, so let's just finish up this subject matter.

Are we finished with this subject matter?

Mr. YATES. I thought he wanted redrafting.

Mr. TAYLOR. I will show you this letter from OMB. I think you will be interested in it, to support my contention that they are in violation of the law.

Mr. YATES. Fine.

Mr. MEEDS. Very well, we will adjourn until tomorrow at 10 a.m., in this same room.

[Whereupon, the hearing recessed, at 3:30 p.m., to reconvene Friday, January 7, 1977, at 10 a.m.]

MEETINGS OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION

FRIDAY, JANUARY 7, 1977

AMERICAN INDIAN POLICY REVIEW COMMISSION,
Washington, D.C.

The Commission met, pursuant to notice, at 10 a.m., in room 1224, Dirksen Senate Office Building, Senator James Abourezk (chairman of the Commission) presiding.

Present: Senator James Abourezk, chairman; Commissioners Ada Deer; John Borbridge; Adolph L. Dial; Louis R. Bruce; Jake Whitecrow; and Congressmen Sidney R. Yates; Lloyd Meeds.

Staff present: Ernest L. Stevens, staff director; Ernestine Duchenaux; Peter Taylor; Paul Alexander; Ray Goetting; Donald Wharton; Charles Wilkinson; Dr. Patricia Zell; Max Richtman; Gil Hall; and Alan Parker.

Chairman ABOUREZK. The American Indian Policy Review Commission meeting will resume, pending the arrival of Congressman Yates.

Peter.

Mr. TAYLOR. Mr. Chairman, we will start today with tribal government which I believe is chapter 4.

Chairman ABOUREZK. You apparently finished the other one yesterday; right?

Mr. TAYLOR. Chapter 5. I think we resolved the problem yesterday, or came to a resolution on the question of a recommendation dealing with the investment of tribal funds. I believe we concluded on a minor note of confusion, but I hope that it was cleared up.

I might make one followthrough comment on the point where we left off yesterday which was the cause for the reform of investment procedures of the Bureau of Indian Affairs of Indian trust moneys. I learned after the hearing that in 1969 the GAO report was issued dealing with this question which led to some reforms. A second report was issued in 1972 which I believe led to some additional reforms.

Now we have both of those reports in our office and I would be glad to supply them.

Mr. YATES. Were all the recommendations of GAO complied with in terms of the investment? Do you know?

Mr. TAYLOR. I frankly don't know, Mr. Yates.

Mr. YATES. Could you check that?

Mr. TAYLOR. Yes, sir.

Chairman ABOUREZK. I am sorry I missed that part yesterday. Are you recommending new laws to take care of investment?

Mr. TAYLOR. We have in our section on trust responsibility several very detailed recommendations. I think we decided instead to have a general position that the Bureau of Indian Affairs and the executive should return the maximum return on Indian moneys commensurate with reasonable investment procedures.

Chairman ABOUREZK. All right. How will we direct that as a Commission? Will we do it by legislation, or will the Commission recommend to the administration that that be done?

Mr. TAYLOR. Mr. Chairman, this goes back to a point that Charlie Wilkinson made yesterday. I don't think every recommendation out of this Commission is necessarily going to be of a legislative nature. Some of it is adoption of principles. Charlie mentioned the concept of task force No. 9 which is a revision of title 25—a codification.

The proposal was made in chapter 1 of the task force report. It starts out with a statement of findings and a declaration of policy. So, in this particular instance I would say our recommendation in this area would be a policy statement.

Chairman ABOUREZK. I understand everything you say here is going to be a policy statement, Pete, but how will that policy be implemented? That is what we want to know from you and how you are going to phrase that.

Mr. TAYLOR. That is a more difficult technical area. In our last chapter here, one of our recommendations is that the report of task force No. 9, which dealt specifically with legislation all the way through title 25, be referred to a committee. I suppose it would go to the Senate Indian Affairs Committee, that is being contemplated, for action on the very specific recommendations.

Chairman ABOUREZK. All right. But what I am asking is: If the policy we are going to set out requires some action on the part of the administration, then you should say so. The administration should adopt regulations such as follows. Or, that Congress should enact legislation as follows.

That will be really about the only two ways you can set things out; either the Congress ought to do this or the administration, the Interior Department or whoever ought to do that.

Mr. TAYLOR. We will adopt such a policy. Frankly, I would like to review these two GAO reports. I was not aware of these until yesterday.

Chairman ABOUREZK. If you have a GAO report that ought to be followed, then you ought to refer specifically to that and say the administration ought to follow that to the letter.

Mr. TAYLOR. Right. I think Paul would like to say something.

Mr. ALEXANDER. In some of these areas, particularly in the portions that would be the first section of 25 U.S.C., other portions of the legislation, which would provide the mechanisms proposing the trustee accountable, is a dualistic instance. In some places it would be a recommendation for establishing a principle of a code chapter which would have to be tied in terms of enforcement and a variety of administrative procedures which gets us into attorney fees and some of the discussion we had yesterday, which is one of the reasons why we did say that that whole report should be treated in total, because the answers are found in three or four places. One of the things that

we may have to do with the Commission report is in a substantial amount a cross-reference to the enforcement mechanism as opposed to the policy statement and standards and so on.

They don't always form the report in the same specific area.

Commissioner BORBRIDGE. I have a question relative to some of the discussions that we had yesterday concerning the obligation of the Department of the Interior to invest the funds on deposit in the Treasury of the United States or otherwise resulting from judgment funds that became the property of the various Indian tribes.

With respect to our discussion it was noted that at least at an earlier time, meaning just within the past several years, the Department had not aggressively followed a posture of so investing the funds so as to realize the highest possible return. I believe that it was also mentioned that this subject was a matter of litigation. I understand that at one point the Indian tribes were successful and that at another point it was suggested by staff that there was a case which seemed to reach an unfavorable conclusion.

The reason I want to review this is that it appears very clear to me that we should be concise as to whether or not we, as a Commission, have taken a stand on this, or whether or not staff have presented a recommendation in which this Commission can take a very clear position if it so decides with respect to the right of the tribes. One, to have those funds as a matter of policy so invested and administered as to realize the highest possible return. And, two, I would think to ensure that the tribes would have the right to at least receive from the Commission a posture which would pose in a positive sense our belief that they should have a right to recover for the failure of the Department and, in effect, the Federal Government to properly fulfill its trustee function.

May I have a comment from staff on this? Are we on the right course here?

Mr. TAYLOR. Mr. Borbridge, my feeling is our recommendation, as it resulted yesterday, does not cover all of the bases that you have just mentioned. I think that it should, and I believe that by the time of our February meeting we will have this down into specifics that will cover the bases that you are talking about.

Commissioner BORBRIDGE. Fine. Thank you.

Commissioner BRUCE. I would like to ask John a question. You mean recover for years past?

Commissioner BORBRIDGE. That is correct. Yes, Commissioner Bruce. I would see, Mr. Chairman, that this would be a matter of policy. We would direct, or at least take the steps to insure that the Department of the Interior would be directed to so invest the funds as to realize the highest possible return for the Indian tribes. The second point would be the right of the Indian tribes to recover for the failure of the Federal Government to follow the posture which to me seemed the most practical and commonsense thing in the world. I suppose that may be partly why it wasn't done.

Mr. YATES. Do the social security benefactors have a like right? To have the funds in their social security trust fund invested in the highest security?

Chairman ABOUREZK. I think so.

Mr. YATES. By Government obligation they do?

Chairman ABOUREZK. That does bring up an interesting question. When we say the highest return commensurate with a safe investment: Do you have that part included?

Mr. TAYLOR. Yes.

Mr. YATES. It is the highest return for a trustee, I would guess, because he has a limited scope.

Commissioner BORBRIDGE. I think, Mr. Chairman, that Commissioner Yates is entirely correct in that. There would be the requirement for example, that has always been imposed on such funds for collateralization as to both principal and interest. I would assume, that within the bounds of the requirements of the administration as such, that for such trust funds the highest possible returns would be sought.

Chairman ABOUREZK. Are we ready now to go into tribal government?

Mr. TAYLOR. Yes, sir.

Chairman ABOUREZK. Let me make an opening comment about this. I understand from the staff that this will be redrafted. Now is that correct? This is not a final version.

The comment I want to make: It is long and perhaps a bit too technical and it ought to be redone in the framework of what I talked about yesterday. That is: It ought to be in a condition so that when someone who knows nothing about the issue can pick it up, easily understand it, and read it. We want to attract readers to this report. We don't want to drive them away.

I talked to staff yesterday and they agreed with that.

Mr. YATES. How can you avoid being legalistic?

Chairman ABOUREZK. I think you can still justify it without being overly technical in your position.

Mr. YATES. You want to make it colorful as well as legalistic.

Chairman ABOUREZK. Not necessarily colorful but readable, I guess.

Mr. YATES. OK.

Chairman ABOUREZK. Sid, you know, you are a lawyer. Legal writing and writing are two different things.

Mr. YATES. That is true.

Is there any way of simplifying by making reference to the coverage on the legal aspects of tribal government in the trust responsibility section?

Mr. ALEXANDER. There are several things that need to be done with this chapter, as well as others, that will require us to finish more sections of the report before we can get done. There is a lot of redundancy. There are a lot of cases that are explained over and over again. There are a lot of concepts that are reexplained. And reference can be made back to the legal concepts chapter in shortened versions, and we will be doing that.

It needs very heavy editing and it needs a question of balancing.

Chairman ABOUREZK. That is true. You have done a section on legal concepts; you have done a section on history; but yet the ideas out of those two sections have been repeated over and over again. In this particular section I don't think they necessarily need to be.

Mr. YATES. Right.

Mr. TAYLOR. All right. We are into the chapter on tribal government and that is chapter 5 in our book.

As the author of the historical introduction here, I will have to come back to a few of the comments that have been made. The first section of it is a historical introduction to tribal government. The second section of it—as it is presently laid out—deals with constraints. This is part B—constraints on tribal government. It is an analysis of current Federal funding practices, delivery systems, and its impact on tribal governments.

Now I think that that section may be removed to Federal administration because it deals so heavily with Federal administration. There is a great interplay between the Federal delivery mechanisms and tribal governments. So it becomes a judgment call as to which chapter you put it into.

Part C of this chapter on tribal government will deal with jurisdiction. This is the area where I think the greatest amount of work remains to be done. It is an area that we got into in our November meeting, which we simply had not gotten fleshed out in narrative form for this meeting today, and I must apologize for that. We did what we could to get ready for the meeting.

The fourth section in here deals with problems under Public Law 83–280. The last section in here is called "Other Justice Systems," and it explores the interrelationship of tribal courts with Federal court systems and State court systems, as well as law enforcement mechanisms.

Now I would like to go back and start with the historical section here. There was a reason, I think, for the redundancy. I am certainly amenable to the comments that have been made here today, but I would like to explain why this is in here.

It seems to me that one of the basic problems is we have to put tribal government into some sort of a historical perspective to understand where they are at today. I think D'Arcy McNickle's history was an excellent review on a very broad base of Federal policy and actions which led tribes to the situation they are in today.

I felt that there was a need to focus on the tribal government aspect of it in order to make clear where the tribes are today and what is happening with tribal government. Frankly, if it reads like a law review article, I am quite willing to see what we can do editingwise to clarify that. But I do feel that it is a legal problem.

It is a question of the legal history, as well as the social history, that explains where these tribal governments are today.

Chairman ABOUREZK. Well, Pete, along that line, let me just make a couple of more specific observations.

Mr. MEEKS. It sure would be nice, Mr. Chairman, if the staff would number the pages. It would be helpful.

Mr. TAYLOR. This will not happen again. Again it is a case of putting things into a book in a rather hurried fashion as they came out of the typewriters.

Chairman ABOUREZK. Well, I don't know that you could ever justify not numbering a page, Pete. But we will let that pass. We will give you an A for effort.

On the fourth page of the section, down at the bottom, the paragraph beginning with "These basic conceptions receive judicial recognition in landmark Supreme Court decisions over the next decade" and then you list them all and footnote the title of the cases.

I don't know why, for readability, you couldn't just say these basic conceptions receive judicial recognitions in three landmark Supreme Court decisions over the next decade and then put the footnote reference and cite the cases in this footnote.

There is nothing worse than plowing through a bunch of Supreme Court cites; right?

Mr. ALEXANDER. Yes, sir. That is not a problem.

Chairman ABOUREZK. I know it is not a problem. I am just trying to be specific about it just to show you where you could make it much more readable than you have.

Up above in that same page, line 3, the first Trade and Intercourse Act in 1970 and the final Trade and Intercourse Act in 1970, well, why can't you just say legislation was premised on the policy position and then footnote the legislation and tell what it is? I think that would be much more preferable so far as being readable.

There is no need for me to go on through and do the editing job right now, but you see what I mean.

Mr. TAYLOR. I understand what you are shooting at there.

Mr. YATES. What do they mean when they say "the gorers without saying"?

Chairman ABOUREZK. "The gorers without saying"? That relates to that saying that it depends on whose "arse" is being gored.

Mr. TAYLOR. I would like to review, just in a very short fashion, essentially what this historical section is doing, because it does lead us to where the tribal government is today and the issues that are confronting this Policy Review Commission.

The beginning legal premises of legislation and of our case law, which was to be *Georgia* v. *Cherokee Nation*, was the tribes within the boundaries in which they were located and sovereign. There were treaty negotiation processes. We developed specific boundaries which both the European immigrants and the tribal leaders sought. They wanted a specification of boundaries to help maintain peace between the two factions of people.

This was not acceptable to the European immigrants that were coming in. It led to a great deal of conflict. In fact, it seems to me that we came very close to having a civil war about 30 years before the one that finally erupted over Indian affairs.

The 1830 removal policy came into effect and many tribes were removed westward. In those treaties very solemn guarantees were made that the argument that had surfaced in the 1830's, and before, was centered on the concept that one sovereign cannot exist within the boundaries of another sovereign.

When the tribes were removed west specific language was put in the treaties that never again would this reservation to which they were going, or this new territory, ever be included within the boundaries of a State or a territory.

Mr. MEEDS. And that language also stated further that any laws which the Cherokees passed on their reservations must be consistent with the Constitution of the United States; did it not?

Mr. TAYLOR. It did; and I think that this raises a question where I thought there might be some confusion. I think what was being said here, and I am sure it would not be difficult to substantiate, is that with our 1834 Trade and Intercourse Act we were establishing certain

Federal laws that would be applicable in the relation of non-Indians with the Indian people. The Indian people could not pass laws that conflicted with Federal law, but it did not bring them in subject to the Constitution, if that is the point that is being suggested.

Mr. MEEDS. Treaties on tribal sovereignty are not a creature of the Constitution.

Mr. TAYLOR. No; they are not. Well, the treaties on tribal sovereignty are not.

Mr. MEEDS. But tribal sovereignty is not a subject matter of the Constitution.

Mr. TAYLOR. That is correct.

Mr. YATES. I wonder whether that is correct. Isn't there recognition of it according to the Supreme Court decision? The Constitution recognizes the sovereignty of the Indian tribes with whom the Government is dealing; did it not?

Mr. TAYLOR. It is implicit. The Constitution authorizes Congress to regulate the affairs with Indian tribes and with foreign nations. Implicit in the regulatory concept is a recognition that these tribes are governments but it is not a specific recognition.

Mr. WILKINSON. In this line of reasoning, Congressman Yates, it makes it clear that tribes are not created by the Federal Government. They have their own inherent sovereignty.

Mr. TAYLOR. The next definite procedure after the westward removal was essentially the manifest destiny in our history where we moved across the continent. It led to the establishment of reservation systems and negotiation of treaties with the tribes in the Plains areas and essentially removing many of them to what is now the State of Oklahoma.

During this period these tribes came under a really total military dominance. The first concept of maintaining any law and order on Indian reservations didn't come until around 1876 with the idea of using Indian people themselves, employing them as the instrument by which social conduct would be regulated. Up to that point it had been entirely a military operation, There might be a civilian Indian agent there but his instrument for carrying out any of his policies was the U.S. military.

Mr. ALEXANDER. It is important to recognize that that development of the Indian police was based on the concept of the warrior society which was utilized by the tribal governments historically, particularly in the Plains area, to regulate conduct within the tribe. So it was based on preexisting tribal mechanisms for law enforcement.

Mr. TAYLOR. Well, during this period the tribal governments that were operating on a governmental basis that I think we would recognize today as being—they were the Five Civilized Tribes who had adopted systems very similar to our own, particularly the Cherokee and the Choctaw. They had legislatures, they had courts, their principal chief was the executive, and their whole governmental system was very similar to our own.

We had questions come up during this period regarding tribal jurisdiction over non-Indians. The remainder of the tribes, the Pueblos we essentially isolated. They weren't involved with the non-Indian situation. The Plains tribes simply didn't have governments that functioned in the same fashion as ours. They didn't have the same kinds of prob-

lems. They didn't have the question of taxation, for example, of land-use, regulation of social services.

But the Five Civilized Tribes were involved with government in the same nature that we were. Their economic systems were very similar to ours—agricultural and cattle raising. But we do have opinions that came out during the latter half of the 1800's—legal opinions dealing with the powers of tribal governments.

These opinions were premised on two different concepts and this is the point that is brought out here. One concept is premised on tribal sovereignty per se, the power of a government to act on the people and the property within its boundaries.

The other concept that evolved was the power of removal. It is a power similar to that of a landlord to eject trespassers. I think this led to some confusion in the concept of where the powers of tribes spring from, and it is a point that becomes rather important at a later date, essentially around 1934.

From 1887 until 1934 the entire thrust of Federal policy was one of destroying tribal government, eliminating it, and assimilating the Indian people into the mainstream of American culture. There was no attention paid to tribal government.

The Five Civilized Tribes, because of their sophistication, bore the brunt of specific legislation stripping them of judicial powers. Finally an act was passed which said that even their tribal laws could not be enforced, even in a Federal court.

These are the Curtis Act of 1898 and a final disposition of affairs in 1906. So our policy at that point was one of doing away with tribal government.

By 1934 we recognized the incapacity to carry out this assimilation policy. It simply was not working, and I think that the failure of that is well-recognized.

We set off on a new course with the Indian Reorganization Act—recognizing the inherent sovereignty of tribes, authorizing them if they so chose to organize under that act with written constitutions which would be subject to the approval of the Secretary of the Interior. But the concept was one of restoration of tribal government.

Now what we had at this point were tribal courts and tribal councils that were legislatively functioning. But I think the vehicle that I would focus on today is the tribal court which essentially was an outgrowth of these courts that had been set up in the late 1870's under the aegis of the superintendent of Indian affairs as a means of regulating the social conduct of Indians within the reservation.

As of 1934, following this policy of the destruction of tribal governments and then the turnaround and the recognition that these governments have to be recognized and we have to work through those governments, because these people are simply not going to go away, the legal thinking at that point was geared to the past 50 years of this policy. It was essentially recognizing the powers of tribes to regulate their own members.

The Federal regulations, that were adopted by the Secretary in 1935, was premised on the power of tribes to regulate their own members. Many of the powers of tribes that were identified, particularly where a non-Indian was involved; were premised on this power of removal.

Without the removal power, based on the nonsovereignty thinking, tribes would have had no power whatsoever to control any one within the boundaries. Interior was confronted with numerous situations in which they could not support a tribal power based on a removal theory and they found themselves evolving into the sovereignty concept, and returning to it.

But frequently when a tribe would attempt to pass an ordinance that had some regulatory authority over non-Indians, Interior would disapprove it. It wasn't until 1956 that we again found the courts coming back, that tribes were able to get into the courts to even raise the issue that we find courts returning to the sovereignty concept. That was the *Iron Crow* v. *Oglala Sioux Tribe* case that I mentioned in the last meeting, where an Indian challenged the power of his own tribe to write a law governing adultery. He challenged the right of his tribe to establish a court to try him. The Federal district court that reviewed this case found that the power of the tribe is inherent in it. It is an outgrowth of its own sovereignty.

In 1959, in the Supreme Court case of *Williams* v. *Lee*, we find the first Supreme Court since 1902, or 1906, coming back to this point of tribal sovereignty in relationship to non-Indians.

There are quite a number of judicial decisions, followed by the tribes, moving into this question of regulation of non-Indians. It brings us to where we are today. I think it explains the dormancy of the judicial decisions on this subject.

It is the historical overlay here, and the Federal policy of suppression and administrative policy since 1934 of refusing to approve tribal ordinances, which have precluded judicial challenges on this subject. But we do find since 1959 with *Williams* v. *Lee* moving into *McClanahan* v. *Arizona Tax Commision* a judicial recognition or acceptance, a stamp of approval of this tribal jurisdiction over non-Indians. So it is a judicially evolving concept right now as to the extent of that jurisdiction—how far it is going to reach.

Two lower court decisions, *Oliphant* v. *Schlie* and one coming behind that called *Belgarde*, have both upheld the tribes to exercise criminal jurisdiction over non-Indians within reservation boundaries. I frankly have no doubt whatsoever that when, and if, this gets to the Supreme Court the Court will approve these cases.

I think the tax situations are compelling in this.

Mr. YATES. How do you recognize that with the Pine Bluff situation and the FBI and the Indians wanting the FBI off the reservations?

Mr. TAYLOR. Well, the Federal Government has concurrent jurisdiction with tribes on an Indian reservation.

Mr. YATES. So there isn't total sovereignty?

Mr. TAYLOR. No. As you observed yesterday, there is no total sovereignty among any of the governments.

Mr. YATES. I mean total sovereignty in terms of criminal control over the reservation?

Mr. TAYLOR. Paul is saying it is tripartite. There is three-way jurisdiction going on Indian reservations right now.

Mr. YATES. The reason I raise the point is I suddenly have the impression, from what you were saying, that the Indian people have criminal jurisdiction over their reservations and that if a crime did occur by an Indian against the tribe, the tribe could try it.

Mr. TAYLOR. The tribe can try it.

Mr. YATES. But that doesn't exclude the possibility of that same crime being tried in the Federal court?

Mr. TAYLOR. Under the law, as it stands right now, it very well might, Mr. Yates. There is a case called *United States* v. *La Plant*, I think it was in 1956 or around that period, in which there was an assault case. An Indian assaulted a non-Indian, and the Federal people moved in and said we are going to try that as a Federal offense, which they can do under the General Crimes Act. That is 18 U.S.C. 1152. It is a statute that springs clear from 1834.

After having brought an indictment, or starting the Federal procedure, the Federal Government simply sat on the case and didn't do anything. So the tribe moved to prosecute this Indian individual. There is more than one actually, and they did prosecute.

Then the Feds began moving to prosecute him. And under the 1834 statute there was an amendment to it that specifically said that if an Indian has been punished by the local law of his tribe, then he cannot be punished a second time in a Federal court.

So based on the statutory language the Federal court ruled that he could not be twice prosectued.

Mr. YATES. What about the double jeopardy?

Mr. TAYLOR. The court in that case mentioned double jeopardy as a second reason. However, that was, in my opinion, because they had already established the statutory basis for precluding that second prosecution. Double jeopardy between States and the Federal Government is not a practice and that has been judicially recognized down through the years.

Chairman ABOUREZK. When you say it is not a problem there doesn't seem to be any restriction or bar to a second prosecution for double jeopardy between State and Federal laws.

Mr. TAYLOR. That is what I meant to say.

Chairman ABOUREZK. Because you can be prosecuted under both criminal statutes.

Mr. TAYLOR. That is correct. Now if States are not precluded from subsequent prosecution on the theory that they are a different sovereign from the United States as a sovereign, then surely tribes are not precluded from this. Nor is the Federal Government precluded from subsequent prosecution, except by virtue of that 1834 statute.

Mr. YATES. How do you deal in your treaties with the problem of jurisdiction? You have three jurisdictions now of law enforcement officers. You have an FBI, you have tribal, and you also have the BIA. Do you not?

Mr. TAYLOR. That is correct.

Mr. YATES. Do you propose to change that? I know, for example, that in hearings before our appropriations subcommittee a number of the tribes came in and requested that they be given an appropriation to set up their own police force.

Did you deal with that problem?

Mr. TAYLOR. I believe we do. Actually this takes us to the other justice systems.

Paul, I think you should comment on this.

Mr. ALEXANDER. There are two levels of problems. One is the relationship between the two competing jurisdictions, and the other

level of problem which we deal with more specifically in "Other Justice Systems" is actually what is happening.

Eighty percent plus of all the felony cases that occur on Indian reservations subject to Federal jurisdiction are declined for prosecution. So, what we have, is a situation where tribes can prosecute with existing courts and police situations but they are restricted in what they can impose as a penalty under the Indian Civil Rights Act which is effectively misdemeanor jurisdiction. Because the Indian Civil Rights Act does not dictate tribes shall be restricted to misdemeanor jurisdiction. It restricts the penalty.

You have a situation, and you mentioned Pine Ridge, is an appropriate example of where the problem of the Federal Government effectively exercising the jurisdiction it had is not effectively exercising that jurisdiction.

Recent incidents of response time to major felony events show a 2-hour response time. And by the time the FBI, and this is this month, by the time the FBI arrived a situation that could have been controlled under the BIA police, was out of hand. In that situation, the new chairman of the tribe is trying to build up the tribal police to take over those kinds of functions.

In terms of felony prosecutions you have a situation where either the tribal police or the BIA police are the first on the scene to investigate. The U.S. attorney's office will not accept a case from either one of those instrumentalities. And you have the FBI—who are generally distant from the reservation and generally alien in several different instances to the reservation—have to come in later to investigate the facts which have already been investigated. We have a serious situation with the U.S. attorney not prosecuting. One rationale for their not prosecuting are bad investigations. Others are not knowing the local situation. The other one is that they are generally not the type of cases that U.S. attorneys offices tend to get involved with, or tend to get involved with major cases, and not local law enforcement types of cases.

This is one of the major reasons that tribes are pushing for an expansion of their own law enforcement budgets, to have the local police department be authorized to make the investigations, to make some standards for referral, to increase the penalties that tribes can impose with respect to their jurisdiction.

There are a number of specific recommendations we make at the very end of this chapter about relationships with the U.S. attorneys offices. Standards for prosecutions, and the fact that the FBI is the investigatory arm, occurred around World War II and it is not something that Congress said to the Justice Department, you must rely on FBI investigations. It is the discretion of the Department of Justice and that is the way they operate.

Mr. MEEDS. Mr. Chairman, could we get to some of the questions in regard to the general thrust of Mr. Taylor's report?

Chairman ABOUREZK. Sure. Sid, did you get your question answered?

Mr. YATES. Well, Paul's explanation bears upon the question and the problem bears very much on the question of tribal government. What should the extent of the tribe's jurisdiction be? How much authority should it have? Should it have the punishment of misdemeanors and felonies? That was the reason for my question.

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I know this is a very controversial and serious problem with a great many tribes.

Mr. TAYLOR. Mr. Yates, that is why I was rather emphatic on the separate sovereignty question and the power to have a subsequent prosecution in a Federal court. It goes to a legal issue involved with the Major Crimes Act where the United States has defined 14 different offenses committed by an Indian person that would be subject to Federal prosecution no matter who he commits it against—even if it is another Indian.

The point that I am driving at here—because of these delays in Federal prosecution and Federal investigation and the high frequency of declination of prosecution—it becomes very important to the tribes that they have jurisdiction over people who might be subject to prosecution in Federal court under the Major Crimes Act.

Mr. YATES. How accurate and how complete are your statistics respecting declination and delay of prosecution? Do you have statistics that buttress this?

Mr. ALEXANDER. Yes, the statistics come from a survey from the National Indian Tribal Judges Association in 1973. The survey has a limitation because not all of the U.S. attorneys offices cooperated with it. But that is the best information available.

Our discussions with the Department of Justice, the Office of the Deputy Attorney General, with Doris Meisner, and the Office of Planning and Policy, indicates this.

Mr. YATES. I would think that in making your point for Indian jurisdiction of this you would have as much statistical data to support it as you possibly can. I know, from speaking to several Congressmen from the West, they run into the situation where their Indian people are very much upset because they can't get prosecutions in the Federal courts. I think this is something that ought to be investigated.

May I ask one last question on this point?

Chairman ABOUREZK. Surely.

Mr. YATES. How does the Indian Self-Determination Act bear upon the subject of tribal jurisdiction?

Mr. TAYLOR. I don't believe the Self-Determination Act of 1975 does bear on this question other than that it authorizes the tribes to contract with the Bureau of Indian Affairs for the performance of services.

Mr. YATES. Just tangential then.

Mr. ALEXANDER. Well, it is also implicit in the act because there are specific funds to build up tribal governments—what were known as the 104 funds. So there is an implicit recognition by Congress in Public Law 93-638 of operative governments in building government systems.

Mr. YATES. Thank you, Mr. Chairman.

Mr. MEEDS. Peter, I think that was a very good overview. At least, in my knowledge of the subject matter, it is a very accurate description of what has occurred with regard to tribal government. And your indications of the initial effort by the Federal Government to, in effect, kill tribal government and effect assimilation up until the Indian Reorganization Act in 1934, is quite accurate. Your indications of the effect of the Indian Reorganization Act, and even during the period of termination after the Reorganization Act, at least with regard to

those tribes in which termination was not taking place, there was an effort to recognize some sovereignty, some tribal government and to help that tribal government.

We really have to get back into the question of sovereignty here. We are going to deal with jurisdiction and as to how that sovereignty will be asserted over the non-Indian. The thing I see developing is that we have placed our reliance for the question of sovereignty on cases like *Worcester* and *Cherokee Nation*. Those cases were decided at a time when the policy of the Federal Government was to keep Indians and non-Indians apart.

As you stated in your own brief, the thrust of the treaties was that the tribes were expected to maintain order among their subjects, to prevent degradation among non-Indians, and so forth. That was the situation that existed when the decisions in *Worcester* and those early decisions upon which we hinged the whole sovereignty question were decided.

But that was not the situation after 1887, when the General Allotment Act passed and the allotments that took place afterward, that became in-holdings in the reservations at that time and non-Indians came onto the reservations.

The question of sovereignty: I don't think anyone really q
the sovereignty and juridsiction, for a lot of purposes and in
areas, over Indians. But, and as you very well said, it has come
to the point that sovereignty, and the jurisdiction to assert that sovereignty, run to non-Indians. That, really, is where the collision is occurring now and where it will occur in the immediate future.

Mr. TAYLOR. That is really why I felt this historical perception was needed.

Mr. MEEDS. I think it is absolutely essential and I think yours is accurate. I don't disagree with it at all. I agree when you say that the courts have been interpreting and enlarging tribal sovereignty and jurisdiction over non-Indians.

Mr. TAYLOR. I wouldn't accede to the concept of enlarging.

Mr. MEEDS. Well, the interpretations——

Mr. YATES. Followed.

Mr. MEEDS. Well, follow. There hasn't been anything to follow. The judicial evolvement has been toward a recognition of sovereignty and jurisdiction over non-Indians.

And I agree with that.

What has the legislative pattern been, if any, during that same period of time? Since 1959 and 1960, since *Williams* v. *Lee* and other cases?

Mr. TAYLOR. There has been no legislative pattern to my knowledge on the jurisdictional questions.

Mr. ALEXANDER. There is one exception to that.

Mr. MEEDS. Well, the Indian Civil Rights Act—but I don't know.

Mr. ALEXANDER. We went through this before, but it should be on the record since we are talking about it right now. The original language referred to the restriction on tribal power with respect to a member or an Indian and was deliberately changed to any person.

Mr. MEEDS. That is correct.

Mr. YATES. The original language of what?

Mr. MEEDS. The Indian Civil Rights Act which, as you will recall, Sid, the first 10 amendments did not apply to Indians or people on

Indian reservations actually. Until the passage of the Indian Civil Rights Act in 1966 or 1968—I was involved in that—these 10 amendments, in effect, applied to Indians and we changed it to say a person. So there was no question that there was that intent.

But I think you are also right about this, Peter. There has been nothing from the legislative branch with regard to this whole question. What we are really faced with here—and what the Congress is faced with—is: Whether we are going to allow the question of sovereignty and jurisdiction over non-Indians; what is a reservation; a lot of other things; and what is Indian country. A whole array of questions concerning this.

Are we going to allow it to occur by judicial interpretation, or is the Congress going to take hold of this matter and lay down some guidelines under which these questions evolved? That is really the critical question facing this Commission, as I see it.

We might disagree as to where it ought to go, but I don't think you disagree with me that that is the critical question.

Mr. TAYLOR. Yes. I think it is important to make the posture of the current situation clear. What the courts are doing is finding tribal sovereignty and they are also finding essentially no limitations on it. There are no statutory limitations with minor exceptions.

You have got the exception of the Major Crimes Act which inserted Federal jurisdiction into the picture.

Mr. YATES. How recently were the court decisions to which you refer? How recently?

Mr. TAYLOR. *Mancari* was 1975, *McClanahan* was 1973, *Williams* v. *Lee* was 1959——

Mr. YATES. Which court are you talking about now? The Court of Claims?

Mr. TAYLOR. Supreme Court.

Mr. YATES. The Supreme Court showed a disposition to follow *Worcester* and *Cherokee*?

Mr. TAYLOR. It says they are totally viable. *McClanahan* said that we must consider tribal sovereignty as a backdrop to their analysis.

Mr. YATES. As Mr. Meeds points out, and I think correctly, this is the problem we have as to whether or not we changed the laws.

Mr. TAYLOR. That is well stated.

Mr. MEEDS. Well, I might disagree with that a little bit. Whether we changed the judicially established precedent and judicially established——

Mr. YATES. There is no question Congress does have the right to change the law in this connection. But we have to decide whether we want to change what the courts have said is the current law. I think you stated it correctly.

Mr. MEEDS. I didn't state it quite that way but I am sure I did state it correctly.

Mr. YATES. According to the staff the amendment that I offered was one that the courts approved.

Mr. TAYLOR. I think an important thing here in this judicial evolution process is the cases come up on a fact by fact basis. And the two cases I alluded to: *Oliphant* v. *Schlie* and the *Belgarde* case——

Mr. MEEDS. Bad facts.

Mr. TAYLOR. They are bad facts for persons contesting tribal jurisdiction, and I would like to just reiterate them.

Mr. MEEDS. They are. I don't see how the court could have done anything else.

Mr. TAYLOR. At the sake of perhaps 3 minutes time I would like to just reiterate the fact situation in those cases.

The *Oliphant* case came out of a small reservation in the State of Washington—the Suquamish Tribe. It involved a non-Indian, Oliphant, who appeared at a tribal ceremony. This ceremony is an annual event with the Suquamish Tribe. They get thousands of people in for it.

They called up the local county sheriff and said, "Look, we would like some deputies down here to help maintain order at this ceremony." The county sheriff said, "Well, gee, all my fellows are off tonight. I will be in the office. If you have any problem, call me." The problem is his office is 40 miles away.

So low and behold, they had a problem and Mr. Oliphant is accused of having taken a poke at a tribal police officer who attempted to restrain him. So the tribal police officer arrested him and hauled him down to the city jail in Bremerton. The tribe had a contract with the city jail, so Oliphant went down to the city pokey. He contested the tribal jurisdiction over him because he was a non-Indian.

The case went to the U.S. district court on a habeas corpus petition and the district court affirmed the tribal jurisdiction. It went to the ninth circuit and the ninth circuit affirmed and that is the legal posture of that case right now.

This incident occurred on trust property owned by the tribe, and the *Oliphant* case very carefully points that out.

Very shortly they were confronted with a new situation in which Mr. Oliphant was peripherally involved, where he and a buddy went out to the Suquamish Reservation and apparently overindulged or something, and they were driving around the reservation and the tribal police gave chase to them. I think they were racing around. The race took place through trust property and fee patent porperty.

Eventually, they were stopped on a parcel of fee patent land. The tribal police vehicle pulled in front of this car driven by Belgarde. Belgarde then stepped on the gas and ran into the police car. So again the court immediately had a new situation: Does the tribe have jurisdiction over a non-Indian everywhere within the boundaries on nontrust land?

The district court said: Yes, they do have it. They affirmed the jurisdiction again. I am not sure whether that one went to the ninth circuit or not. Does anyone know?

Mr. WHARTON. It is part of a petition to the Supreme Court now. It is under an unusual procedure, because the *Oliphant* case did not specifically limit the jurisdiction of the tribes on trust land. The appellants have petitioned the court to include *Belgarde* in review of the *Oliphant* case and they have not decided on the petition for certain. So they can do one of three things. They can deny the petition altogether, or take *Oliphant*——

Mr. YATES. As I understand the law: Congress may change treaties with Indian tribes or it may pass laws which impinge upon what the courts have indicated is now Indian sovereignty. If any Indian persons suffer any kind of property damage as a result of that: Doesn't the Government have to pay compensation?

Mr. WHARTON. Yes.

Mr. TAYLOR. I think, as a general proposition, that is true. I would like to make one point here, which we failed to make the last time.

It is true that the Supreme Court decisions have affirmed the right of Congress to alter these treaties. It should be stressed that from an Indian point of view the alteration of these treaties, through the unilateral act of Congress, is considered by them to be illegal.

Mr. YATES. Bad faith at any rate.

Mr. TAYLOR. Yes; and there is no recourse beyond the Supreme Court which has affirmed the power of the United States to do this.

Mr. ALEXANDER. Let me just expand on that for a moment.

The notion is that the Supreme Court, in a political doctrine situation, will not review the act of the sovereign of which it is a part. Just as Chief Justice Marshall makes very clear in the early cases that the courts of the sovereign, in relationship to another sovereign, have no business telling that sovereign it is wrong. Even though the judge uses language to the effect that even though individually it is a matter of international law, the sovereign might be right or wrong, the sovereign's courts cannot tell him that. So that is the posture.

Mr. MEEDS. If the gentlemen will yield: Could I pursue this question of the legislative assertion of definition of what sovereignty and jurisdiction are? In the absence of some taking of a property right, of an interest, compensable right, I don't envision that there would be any right to compensation at all. For instance, let's just say that no Indian tribe has a right to tax a non-Indian—which may actually be flying in the teeth of perhaps some later Supreme Court decisions.

But say we were to say that. I do not conceive that to be a compensable right which an individual Indian or a tribe could get compensation from the Federal Government. On the other hand, if the Congress were to say that Judge Boldt was incorrect in allocating 50 percent of the salmon to the Indians of the treaty area and that it shouldn't be 50 percent, it should only be 25 percent, then I conceive that that is a compensable loss.

Now am I incorrect?

Mr. WHARTON. I wouldn't agree entirely with that.

Mr. MEEDS. OK. Tell me why.

Mr. WHARTON. Particularly with respect to hunting and fishing which you referred to in *U.S.* v. *Washington*. Part of that decision precludes the right to regulate off the reservation.

Mr. MEEDS. That is correct. Before you go any further, I enlarge my position by saying that I think the Congress could absolutely say how that was going to be regulated and wipe Boldt out entirely on what he said about regulation, and it is not a compensable loss at all.

Mr. WHARTON. I guess I just disagree with that.

Mr. YATES. It is not disagreeable to the Indian people?

Mr. MEEDS. Not in a matter of regulation because the Congress reserves plenary authority over Indians and I think the Congress can say how Indians will be regulated in that respect without encountering a compensable loss.

Mr. YATES. What do you mean when you say Congress reserves authority over Indians?

Mr. MEEDS. To pass laws affecting Indians and all other citizens of the United States. That when they pass laws which change their

rights, their obligations, that these are not compensable losses. We do this all the time.

Mr. YATES. Yes; but the Supreme Court has just held that with respect to the obligations of the city of New York they could not be deferred. Why then is that different than a contract between the United States and the Indian people in Washington?

The point I am making is that, if I understand what you are saying——

Mr. MEEDS. I don't know what case you are talking about.

Mr. YATES. I am talking about the Big Mac obligations in New York City. Everybody agrees they delayed payment of those obligations, and the Supreme Court said they couldn't be delayed, and if a person wanted to be paid, they could be paid.

Now you have a treaty between the Indians in Washington and the Federal Government.

Mr. MEEDS. You are talking about a contractual right.

Mr. YATES. Well, isn't a treaty a contract?

Mr. MEEDS. No.

Mr. ALEXANDER. A treaty is an international contract in which a form does not exist for those rights. The Supreme Court would refuse to accept where there is a right and which they can place a value on.

What we shouldn't lose track of in this conversation, by compensatory right is that the powers of government are rights that are invaluable, that cannot have a dollar figure attached to them so that you cannot say that the right of an Indian tribe to regulate land-use control in Papago is worth $100 million or $30 million.

Mr. WILKINSON. I will say one thing. Indian treaties are contracts which create compensable rights, and whether this is one of them I don't know. But they are contracts which create compensable rights.

Chairman ABOUREZK. I would disagree with that.

Mr. MEEDS. I don't think Indian treaties are contracts which create compensable rights because I agree there is no forum. In the absence of the Indians becoming U.S. citizens, there was no forum under which these compensable rights could be asserted.

Mr. WILKINSON. Congressman Meeds, there are hundreds of cases in the Court of Claims. Not in the Indian Claims but in the Court of Claims awarding tribes damages for breach of Indian treaties.

Mr. MEEDS. Under special legislation—everyone of them.

Chairman ABOUREZK. Let me get my word in this thing. I think you are both mistaken on the premise of the thing.

A treaty is not a contractual right. It doesn't have the same standing as a contract and so, therefore, treaties are, really, unenforceable anyway. They are done so today in the United States on the basis of moral authority only, but no legal authority.

But second wherever the right, where the hunting and fishing rights came from in this particular decision, wherever that right derived--and I don't know exactly where it was derived—the taking of that right would be compensable under the fifth amendment. It would be a fifth amendment taking but not based on a treaty.

Mr. WILKINSON. It is based on a treaty. The Court of Claims Act waives sovereign immunity for claims against the Government, but it wasn't specific in any amount. Now I agree that a court was set up to hear those claims, but it wasn't just an Indian court. Tribes

have come in, in numerous cases, alleging and proving breach of treaty rights which were compensable.

I think the Senator's point is that before the Court of Claims was set up to hear many, many cases—not just Indian cases—soverign immunity barred those claims. But the Congress has waived sovereign immunity for contractual claims including treaties.

Mr. MEEDS. OK; that I agree with. We have waived sovereign immunity with regard to treaties and to setting up the Indian Claims Commission and a number of other things. But what I want to do is make a distinction between property rights and the right to govern.

I think property rights of all American citizens are compensable when they are taken. That includes Indian property rights as well as anybody else's. The right to govern is not a compensable right. If the Congress were to enact legislation which says that no Indian tribe can enforce criminal jurisdiction on its reservation, that the Federal Government would have all criminal jurisdiction on reservations, that would not be a compensable right which is taken from the tribes.

Mr. TAYLOR. Mr. Meeds, I am sorrowfully compelled to probably agree with you.

Mr. MEEDS. I know you are.

Mr. TAYLOR. None of the tribes got compensation when Congress placed them under State jurisdiction in Public Law 83–280. They didn't get compensation when the United States asserted Federal jurisdiction in major crimes.

Mr. YATES. Wait a minute, Lloyd. Why did they get compensation from Public Law 83–280?

Mr. TAYLOR. They did not.

Mr. YATES. They did not. Oh, I am sorry. I misunderstood.

Mr. MEEDS. None of the acts, in effect, were restrictions on sovereignty—the power to govern.

Mr. ALEXANDER. But in the point in regulation of hunting and fishing rights: The removal of a power to regulate in that situation impinges on the value of the hunting and fishing rights, and that would be compensable.

Mr. MEEDS. Not at all.

Mr. YATES. How did they argue that? What justification?

Mr. MEEDS. He is just assuming it does. I can just as logically assume that it doesn't. Indeed, it might even enhance it.

Mr. YATES. How does he sustain his argument, Lloyd? I would like to find out how he comes to that conclusion.

Mr. MEEDS. He hasn't.

Mr. ALEXANDER. Because the power to regulate and control the taking of the resource——

Mr. YATES. Take the *Boldt* decision, for example, where the catch is supposed to be divided between the white people and the Indian people. Suppose the Congress were to pass a law saying that the jurisdiction over the regulation should be with the State of Washington, for example. Is that compensable? In what way is it compensable?

Mr. WILKINSON. In this context, much of what a treaty right is the right to be free of State jurisdiction. Understand, Congressman Meeds, I think I agree with the general thrust of what you are saying but I think I can see proof areas which is what Paul is suggesting where there might be problems.

Suppose that the States are given jurisdiction by the Federal Government, and in fact fishing rights are cut back——

Mr. MEEDS. Well, that is a different question.

Mr. WILKINSON. I think it is a serious question.

Mr. MEEDS. It is a serious question in considering it. But we are theorizing right now. And in that theory we, I think, must suppose, as we always do when we theorize, that people are going to do what they are supposed to do. Now if you want to argue that that is a bad thing to do because the States might do this, then that is a different argument.

Mr. YATES. Of course it overlooks history, too.

Mr. MEEDS. Well, whatever, but the theory is that the Congress can change the sovereignty—that is to say the power to govern—or the Indian tribes can wipe it out as far as that is concerned, and unless it affects a property right it is not compensable.

Mr. YATES. I think that I am constrained to agree with the presentation of his argument in this. In granting jurisdiction over hunting and fishing in the State of Washington to the State, there is no compensable right at that point. If the State, by its regulation, takes away the property right of the Indian people there, that is compensable.

Mr. MEEDS. Exactly.

Mr. WILKINSON. I have to say I think it is just, perhaps, a little tougher than that. An Indian treaty really says that the States have no power to regulate at all. That is really what it says.

If you were to give the States the power to impose that, that would be giving them the power to regulate and would result in fewer fish in the Indian nets.

Mr. YATES. But you don't know that.

Mr. ALEXANDER. The power to regulate hunting and fishing is an economic power; it is an income resource to tribes, for licensing and other such measures.

Mr. MEEDS. Paul, would you agree with me that the Federal Government would, without compensation, say legislatively that no tribe has the right to tax non-Indians and that that is not a compensable loss.

Mr. YATES. On Indian land?

Mr. MEEDS. On Indian land or anyplace else.

That is a much stronger showing of actual taking of a governmental power which means income.

Mr. YATES. Lloyd, would you yield on that for a factual situation? Suppose, on a possible situation, for example, there were some white people whose kids went to school, and the Indian people were taxed as well as the white people for the administration of the school—in spite of the congressional statute that Mr. Meeds refers to—could the Papagos enforce that?

Mr. ALEXANDER. I think a good argument can be made for an actual economic loss which could be compensable. You can't justify property rights in a narrow sense of an identifiable crop of trees which are being removed or a specific acreage that is being removed, and the situations will vary. It is difficult. I will clearly grant that it is difficult to find the value on many powers of governments, but there are many situations

in economic value that can be shown as natural loss. I think a case can be made.

Commissioner BORBRIDGE. Mr. Chairman, a number of things happen in here. I want to review them in my own mind as to my perception of what has been said or not said. Starting with a familiar subject, the aboriginal rights and claims, and then moving over into sovereignty and then coming to the point where we are, I would state the following:

We recognize the right of sovereign to extinguish aboriginal title and the courts have pretty well upheld this to the extent that in Alaska we came face-to-face with the *Tee-Hit-Ton* case which again reiterated the right of the sovereign. So I don't think that with respect to the right of the sovereign to extinguish aboriginal title that we are questioning that right. Rather, what I would say, is that it has been a matter of policy, not always strictly adhered to in the highest standards, that the Government has chosen to weigh its amenity. And, in effect, through a series of treaties, and starting about 1871 with executive agreements, and then later in acts of general and specific jurisdiction, it has enabled the Indian tribes to come into the courts where through litigation the tribes have had an opportunity to recover for the losses which have been caused by either action taken by the Government as it impacted the aboriginal land or the failure of the Government to so act to exercise a trust position by protecting those Indian lands.

What I am stating here, as I perceive it as a layman on the one hand, we have the bare naked question of the bare naked power of the sovereign to act unilaterally. But I am also saying that we have to say clearly for the record that has not been the history and that has not been the policy.

I think it is one thing to say that we can extinguish it and not pay a cent. But I think, out of fairness, we have to make clear for the record this is not what this Government has been doing over more than these 100 years that we have had of litigation and history and national policy.

Then, as we come to the matter of sovereignty, again I think we have said on numerous occasions, although I am not sure, that there is unanimity and agreement on the issue that sovereignty again is composed of a number of characteristics and that, as we have observed the history of from whence sovereignty characteristics have come, they have not been conferred by judicial action, nor have they been conferred by legislative action of the Federal Government, but that we have had the unusual situation of having a sovereign within a sovereign. Therefore we say, as to the Indian tribe, there is no absolute sovereignty.

Again I would like to point out that, at least in the view of a layman, that what we have here, then, is a matter in which the Government has sought to temper the exercise of bare naked power by a more enlightened posture and that the posture of recompense for the taking of aboriginal rights, it seems to me, would be very hard to divorce from any takings of the sovereign rights. That is the rights of self-government, some of which, without any question, will bear upon the capability of a tribe to so act as either to protect or enhance the rights to safeguard its land, its resources, and other associated rights.

I think we have all stuck an oar in. I have just now stuck a paddle in.

Mr. TAYLOR. Commissioner Borbridge, I don't think that the principles involved could have been better expressed. It was as if you were reading out of Felix Cohen.

Commissioner DIAL. I guess I will direct this to anyone on the staff here. It appears to me that maybe Congressman Meeds' discussion here is along the lines that Congress can do no wrong as far as legislation goes, and maybe he is ignoring *Marlboro* v. *Madison*. It seems to me that it is not brought out that the courts have a place, that we do have judicial review. From 1801 to 1835, during the time of John Marshall—he made more decisions than any other judge in history which are still holding today—and we couldn't possibly ignore *Worcester* v. *Georgia* and the *Cherokee Nation* case. I just wonder if we aren't overlooking here the power of the Supreme Court of the United States—yet it is almost 150 years ago—and I am concerned more whereby Congress can do this and they can do that.

We know that Congress can pass laws, but I am sure that the Congress, in any law, will want to consider certain Supreme Court decisions, do they not, Congressman Meeds?

Mr. MEEDS. If the gentleman will yield. I hope I have not been construed as having stated that I think this is what should happen. I am simply attempting to protect the sovereignty of the U.S. Government in this instance.

And to get to what Mr. Borbridge says, I think the policy that we take and the humility with which we approach these things is often more important than what we can do.

But I think it is also very important to establish the base of what these things are premised on. That is all I am trying to do.

Mr. WILKINSON. Congressman Meeds, just very briefly, I just unquestionably agree with your analysis as applied to most governments. To take your example of a demonstrable loss to the taxing capability of a tribe, the dimunition in annual income of a tribe, that with the city of New York, perhaps that would be all right to alter that taxing structure, but I don't know of any case law on the Indian point. But what I am saying is that if you turn that case over to a law firm like the Native American Rights Fund—the Indian treaty and a demonstrable cash loss to a tribe—I think there is a real possibility some recovery might be awarded in the case of an Indian treaty.

Mr. MEEDS. I can understand I would certainly argue that if I were representing an Indian tribe to which it occurred. If I were on the other side, I would be arguing very strenuously that the Federal Government in assertion of its sovereignty can impair or can prescribe the exercise of any other sovereign within the fabric of this country except States, in some instances. Subject to constitutional restriction, let's put it that way.

And that, only if we maintain that as the Federal Government sovereign, because if you start eroding that sovereignty by allowing or preventing the Federal Government from exercising it in certain instances, then you have created other sovereigns which are more sovereign in those instances.

And I, as you know, am opposed to doing that.

Mr. YATES. We have that situation with the Concorde airplane in New York City. The question is whether the Federal Government has

the right to let the Concorde fly into New York City, by giving it a certificate, when the Port of New York Authority says it can't fly in. As of now, at least without a legal decision, the Port of New York Authority says it can't come in and it is not going to come in. I think it will probably wind up in the Supreme Court.

Mr. MEEDS. My impression on that would be that the Federal Government will win that case. I think it clearly falls under the Congress clause on which the Federal Government has plenary jurisdiction.

Mr. YATES. But the question of preemption is whether the Federal Government has acted. Just as you point out here, the question is whether the Federal Government has not acted, but should have, to take the jurisdiction away.

It still leaves the question of compensation. That may come with the question of the position that may result.

Mr. MEEDS. If there is any taking of property rights, there will have to be compensation, as I see it. No question about it. But you have got to be very careful to distinguish between the taking of property rights and the powers of sovereignty.

I don't think there is any compensation for legislating away the rights of sovereignty of Indian tribes.

It is billions of dollars down the line on it and it is obviously going to be litigated. I can't predict how it will come out, except how I feel, personally.

Chairman ABOUREZK. The staff has advised that in order to get everybody lunch today we have got to break up at about a quarter to 12. Otherwise we will be unable to get into the dining rooms or cafeterias because there are a lot of groups coming in.

So we have got 5 minutes, and whoever is talking I am going to have to cut him off at that time. Either that or agree not to eat. It is all right with me.

We have to be in the dining room before 12, that is why we are breaking up at a quarter of 12.

Commissioner WHITECROW. Mr. Chairman, I would like to comment here for just a moment. As I perceive this particular situation, and as I look at Public Law 93-580 that established this particular Commission, I look at it from the standpoint of an Indian out in the field that has been active in tribal affairs most all of his life and from the standpoint of the historical treatment in the relationship between the Federal Government and tribes, and as States moved into assuming jurisdiction.

I looked at it from that standpoint and I thought: Well, now, here is an opportunity, once in a lifetime, whereby we might be able to get some justice. We might be able to get some of the historical directions turned around and that the morality involved and that the legality involved in these actions would actually be brought to the forefront so that once and for all the American people could actually see these long lists of broken treaties, the actions and reactions that took place.

I don't think there is any question in this particular instance of the power of sovereignty of the United States. I think we all really understand that if the U.S. Congress desires to negate every treaty and every relationship that the Federal Government has with the

American Indians around the country, they could so do it. The only recourse that the American Indian would have would be in the political structure, and being outnumbered as they are, it would be a terrific fight uphill for them to do so.

I think what we need to do in this particular instance is take a look at what we have done in the past with other nations that have been conquered by the United States of America and its allied nations. What did we do with Austria and Germany? What did we do in Italy? What did we do in Japan?

I think these particular relationships, insofar as our Federal Government relating to other sovereign nations as conquered nations, have to be taken into effect. If we took a look at what we did do with those nations that we have just recently conquered and what have we done to those nations that we conquered years and years ago, and those court cases that have been handed down through the many years—*Worcester* v. *Georgia*, that particular case is still on the books, it is still a precedent setting case by the Supreme Court—and if we start looking at those particular instances whereby decisions have been made and then we take a look at any new decision that has come down the road—every decision made has to be based upon the premise of what took place yesterday, what took place in the past—then we cannot, in all due respect, turn our backs upon those decisions and try to create a new atmosphere within these concepts.

The tribes have the resources. I believe our task force No. 7 pointed out the fact that within those lands some 50 percent of the total energy reserve of the United States is still within those lands.

My principal concern here is that we lay down the protections so that those lands and those resources can be protected. So that those people owning those lands can receive fair and compensable rights—moneys for those particular resources if they so desire to contract for them.

With the freedoms of our United States of America and its Constitution, I think our individual citizens and our tribes have those rights. I don't think we are asking for anything more than the morality to be employed and that the dire circumstances of history be rectified. I think that this Commission has that right and has that obligation—has a once-in-a-lifetime opportunity to do so—and I would like for each and every one of us to think about those aspects even though some of these may not be politically popular. What are the moral and the legal issues involved?

Sure we have got an awful lot of non-Indian people out there just waiting around the reservation today to pounce upon those resources. The greediness of people definitely will prevail, because there are more greedy people in this world than there are sane people. Now that is a definite statement that I will make and I will stand on it from now on, and I will go down the list.

Chairman ABOUREZK. We are recessed for lunch. We will resume at 1 o'clock.

[Whereupon, at 11:45 a.m., the meeting was recessed to reconvene at 1 p.m., this same day.]

AFTERNOON SESSION

Chairman ABOUREZK. We left off just as Jake finished. We have got only this one section completed by the staff. I think we can finish it today and then, hopefully, the remainder of the materials and the rewrite on this material will be ready for our February meeting.

So, do you want to start working on the principles and the recommendations?

Commissioner DIAL. Mr. Chairman, before you begin, let's set an hour to adjourn because we are making flight arrangements.

Chairman ABOUREZK. All right. What is your earliest time for getting out of here then?

Commissioner DIAL. I plan to leave at something after 4 p.m.

Chairman ABOUREZK. Let's adjourn at 3:15 p.m. today and let's try to get through it.

Mr. YATES. All right. Let's stop Yates and Meeds from caucusing.

Chairman ABOUREZK. If we did that, we could adjourn now.

Mr. TAYLOR. Mr. Chairman, there are a few more observations.

Chairman ABOUREZK. Before you go, Pete, this is a map we asked for last time; right?

Mr. TAYLOR. Perhaps we should start with that now because I would like to get that out of the way. At our last meeting there was a request for a map. It all derived out of a proposed recommendation we had in this material that I handed out here today.

Mr. Yates, I gave it to you yesterday. Calling or recognizing tribal jurisdiction over all lands within reservation boundaries. The principle involved was a question of tribal jurisdiction over all lands within the boundaries of a reservation and it derives out of a recent Supreme Court decision.

It found that a particular reservation, Sisseton-Wahpeton had been disestablished or that the exterior boundaries had been disestablished by one of the allotment and opening statutes for non-Indians who were authorized to homestead.

I think the point of contention was the use of the term original reservation boundaries and we were asked to draw a map that would show original reservation boundaries and the diminishment of tribal lands that had occurred.

So we have prepared this map. Well, Fred and Kevin both prepared this map and I consulted with them a little bit. I would like to call on Kevin to explain what it is he has drawn. We have two maps, actually. Kevin, would you come on up.?

Mr. GOVER. The yellow areas that you can see up here are the present reservation boundaries as they were established by the last act of the statute relating to each particular tribe. The red areas are what we could find as the boundaries as of 1885, which would include most of the State of Oklahoma, a great portion of the State of Montana and this is not quite right. Actually, the Sioux Reservation at that point extended to about right here.

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We found that in order to show how the reservation boundaries had been diminished for each individual tribe would have taken the better part of 3 or 4 years and it couldn't be drawn on a single map because there are many papers, particularly in Oklahoma and on the Sioux area, the boundaries have changed so much that at times these five reservations here in Oklahoma covered the whole State.

A treaty in 1867 moved them into their present State, or in 1866, and a treaty in 1867 established the other reservations here.

So what we did was to take just one particular tribe and show the kind of diminishment that occurred. I assume when Pete was talking about jurisdiction within the original boundary, or within the boundary of the reservation, he means the yellow area.

Mr. TAYLOR. That is correct.

Chairman ABOUREZK. Pete, I am trying to recall what was the issue that this centered around. It was concerning reestablishing original boundaries?

Mr. TAYLOR. No. It was a proposed rule, or a finding, that would recognize the tribal jurisdiction extended to the exterior boundaries of the reservation and that in the absence of a specific congressional act, specifically disestablishing or altering reservation boundaries, it was the sense of Congress that no reservation would be found to be disestablished.

The intent of it was to overrule essentially the case that was laid down in the Dakota case.

Chairman ABOUREZK. And that is why I asked that a map be drawn to show how much land would be affected everywhere. The argument that I have against that rule is shown very much by this.

Mr. TAYLOR. We have another map that I think will demonstrate your concern even more than that. Kevin, if you could show that now.

I might say that the request was to show diminishment of all reservation lands. We simply are not able to do that. So we selected a specific area which just happens to be your home State, Senator.

Mr. GOVER. As you can see, this is the area of North Dakota, South Dakota, and Nebraska.

The first treaty with the Great Sioux Nation was the Treaty of Fort Laramie in 1851 and it established the boundaries of the Sioux territory.

As you can see, in this green area, down the Missouri River to this point on the Great Sioux River down to Nebraska over to a point somewhere here in Wyoming and back up to approximately what is now the corner of South Dakota.

A subsequent treaty in 1868, again with the Great Sioux Nation, established this reservation. Again, starting on the east bank of the Missouri River, up the Missouri to what is now the northern boundary of South Dakota, straight down that border to the western boundary of South Dakota straight down to the northern border of Nebraska and back across to Oregon.

Now, the 1868 treaty was the last actual treaty made with the Sioux Nation. In 1876 there was an agreement between the Sioux and the United States. The Sioux contend that it was not an agreement at all; that it read, at this point, from the middle of the Missouri River, up the Missouri and—again, to the top—to the northern border of South Dakota—no, excuse me. It went all the

way up to the present northeast point of Standing Rock down including this orange area down to here. This is the Cheyenne River, and back like this, including all present-day reservations except Crow, Creek, Yankton, Santee, and Sisseton. Yankton, Santee, and Sisseton were established before the Treaty of 1868, but these were not considered to be parties to the Treaty of 1868. They have long since ceded much territory to the United States. Sisseton, in particular.

Santee is an Executive order reservation. Yankton is an agreement reservation that was established, I believe, around the early 1860's. So these three reservations, or the people inhabiting those reservations, were not party to the Treaty of 1868 or the agreement of 1876.

The reservations that you see in yellow area for the most part, were established in the agreements in 1882 and 1883. Although, just to show how difficult it would have been to define each reservation through history, Standing Rock's original order ran something like this, and the rest of that was Cheyenne River.

The border between Pine Ridge and Rosebud did a dance for about 6 years before it was finally established here. And this area, including the olive color and the line there, was the original Lower Brule Reservation.

Now, in 1889, with the Allotment Act, they redrew the reservations again. That established this border of Standing Rock and Cheyenne River and finally established this border.

This section was ceded to the United States. The Lower Brule was moved to this reservation you see here. And the Crow Creek reservation was also established by that reservation.

This section had been formerly the Lower Brule reservation and was added to this one. And I believe the red area——

Chairman ABOUREZK. What you don't show on that map is part of the reservation that has been diminished over the past 60–70 years, which is one thing I think was needed. But I think this is adequate for our purposes right now.

Mr. TAYLOR. Mr. Chairman, that is really what the legal question is, whether or not those reservations have been diminished.

What we are not showing is non-Indian land ownership patterns within the reservation.

Chairman ABOUREZK. What you are not showing?

Mr. TAYLOR. That is correct.

Chairman ABOUREZK. That is what I am saying: That the areas that are in dispute right now for purposes of this dispute are not shown here. That is right, and that is exactly what we are talking about. That is what we discussed the last time—was that the areas that the Indian faction believes has not been diminished. You don't delineate.

But let me just recapitulate the principle—the staff asked for approval of at the last meeting—was the areas that are diminished, that are no longer in Indian ownership but which have not been specifically ceded by congressional act. They are asking for resumption of Indian jurisdiction over those areas once again.

Am I correct in that?

Mr. TAYLOR. I would say that it is a recognition of Indian jurisdiction and I would say jurisdiction which is being exercised at this

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time, and at that time in the *Lakota* case the Sisseton Tribe was exercising jurisdiction.

It involved a case of a child that was taken away by State authorities from its mother. This was on the Sisseton Reservation, which was opened up for settlement by non-Indians and what we call an allotted reservation with a large number of non-Indian parcels of land situated within it.

The facts of the case were that this woman was a Sisseton Indian. She had always lived within the reservation with her child. Part of the time she lived on trust land, part of the time she lived on nontrust land.

The State authorities took this child and put it up for adoption, or placed it in a welfare home, or something, and she contested this action on the grounds that the State had no jurisdiction. This is an Indian mother, an Indian child, and it is an Indian matter. The Sisseton courts should have been the courts to determine what the disposition of that child should be. That was her contention.

It went to the Supreme Court and the Supreme Court held that the exterior boundaries of the Sisseton Reservation, which is this sort of arrowhead reservation up here in the northeast corner, that these boundaries by the allotment and opening statutes had been destroyed.

The exterior boundaries had been disestablished so that the State had jurisdiction over Indians. Whenever they are on a parcel of fee patent land, whenever they are on a parcel of trust land, then it is still tribal jurisdiction.

So what you have now, based on the Dakota decision is a checkerboard reservation.

Chairman ABOUREZK. What the Supreme Court decision did was to abolish that external arrowhead boundary?

Mr. TAYLOR. That is correct.

Chairman ABOUREZK. All right. Now, let's get back to the Rosebud Reservation and what is known as the *Four County* case that is pending in the Supreme Court now.

There are vast areas down there and there are very few Indians living there. Very few Indians own land in those areas. It was opened up, as I recall, by one of the Homestead Acts. Is that right, Pete?

Mr. TAYLOR. After this treaty period, which Kevin has just discussed, there were 15 opening and allotment acts passed with respect to the reservations shown on that map.

Chairman ABOUREZK. All right. So, nonetheless, no matter how it got there, the fact exists now that it is mostly white ownership. Very few Indian people living there

Mr. TAYLOR. In certain of these counties.

Chairman ABOUREZK. In the four county area that is subject to this suit. So the principle we are being asked to approve, or disapprove, is that the Congress ought to resume Indian jurisdiction over those areas where there are very few Indians living.

Mr. TAYLOR. Senator, it is not a case of resuming it——

Chairman ABOUREZK. Pete, just a minute. Let me finish.

They are asking us to allow the Indians to resume jurisdiction over those Indians. Now, the Indians, despite what Pete says, do not have jurisdiction over those areas now. So you could use any technical

nicety you want to, the jurisdiction is held by the State in those four county areas.

Mr. TAYLOR. Senator, I would have to disagree with you.

Chairman ABOUREZK. Let me finish. Then you can disagree all you want.

But that is the principle that we are being asked to establish. Now, my argument is that I think it is a futile act that would cause so much political trouble out in South Dakota and in the other States where this is being asked, that it is really not worth doing.

That is the position I maintain because it doesn't change ownership of the land. It is not going to change anybody's ownership because that is established. It is going to change who has jurisdictional control.

The Rosebud tribe does not have the facility, or the financial capability, to assume jurisdiction over those areas. What the whites are fearful of, if they do assume jurisdiction, is that the Indian tribe will start taxing every business in that area and every person in that area. That is something that they are not accustomed to and they don't want.

My argument is: I don't see the purpose in doing it to create an awful lot of trouble.

Mr. TAYLOR This brings us to a second level of questions, which is the nature of the jurisdiction the tribes would be asserting, but I really have to point out what the jurisdictional picture is within these reservations right now.

There have been judicial decisions for several years that those exterior boundaries, as depicted on that map, other than Sisseton, are intact. Under the Major Crimes Act, 18 U.S.C. 1153, and under the General Crimes Act, 18 U.S.C. 1152, the Federal Government asserts jurisdiction over crimes by an Indian against a non-Indian or a non-Indian against an Indian committed within the boundaries of that reservation.

Chairman ABOUREZK. Which boundaries are you talking about?

Mr. TAYLOR. The boundaries that are shaded in red.

Chairman ABOUREZK. Which means those areas that are in the four-county area?

Mr. TAYLOR. That is right.

Chairman ABOUREZK. The Federal Government does not assume jurisdiction over those people.

Mr. YATES. Senator, I respectfully disagree.

Chairman ABOUREZK. That happens to be my hometown and I know they don't.

Mr. TAYLOR. Perhaps this is the point that is in contest. I know on some reservations—I can't cite the cases directly.

I think we can pull these cases out.

Chairman ABOUREZK. If the Indians win that case in the Supreme Court, what you say is true. But what is again history is not true. Up until this point, right until this minute, what you say is not accurate.

Mr. TAYLOR. Senator, I think one case would be *Beardsley*. I would be glad to check this out and perhaps write a little memorandum on it.

Chairman ABOUREZK. Fine, if you want to do it. I am just telling you I know what the facts are. I know exactly what they are. In fact, I practiced law there.

The Federal Government does not exercise jurisdiction in those four-county areas, not even on trust land for that matter. I don't know that there is very much trust land in those four counties, but they don't even bother with that. That is all considered.

Mr. TAYLOR. You do have a rule here, and it does not come out of the South Dakota situation, but let me step back for a second.

This whole land picture derives out of the policies of the Federal Government that follow the General Allotment Act of 1887. There were some allotment and opening statutes prior to that period, but a large flood of them came afterward—up until 1934.

Actually, by 1910 I think, the procedure was essentially completed, which brought non-Indian settlers into these reservation areas.

A legal question developed in the first half of this century, as to whether or not a parcel of land held in fee patent ownership was still a part of the reservation.

There was a split of authority. The State courts were saying that when a parcel of land passed out of Indian ownership, it also passed out of the reservation.

Federal case law, particularly beginning with *U.S.* v. *Celestine* was holding the opposite direction. The parcel of land, once in the reservation, remained in the reservation until specifically taken out of it by an act of Congress.

This schism in the law developed, and in 1948, when Congress revised title 18 of the United States Code, they enacted section 18 U.S.C. 1151 defining Indian country. That definition stated that Indian country should include all lands within the exterior boundaries of the reservation regardless of its patent status.

There are two other areas that it includes. One is trust land situated outside a reservation boundary and lands held by the ownership of dependent Indian communities, both of those are not relevant to the point that we are discussing right now.

The first Supreme Court decision on that definition of Indian country was *Seymour* v. *Superintendent* around 1961, I believe. It involved the upper half of the Coleville Reservation. Well, I am not sure if it was the upper half or the lower half, frankly. We will say the lower half.

Mr. MEEDS. Incidentally, he is about the only one that knows more Indian law than you do.

Mr. TAYLOR. I think Frank and I will have to have a drink on that, but I doubt it.

But it was a burglary that occurred on non-Indian owned property within the boundaries of this reservation and the court said this is Indian country, so they laid down a rule. The whole purpose of that rule was to get away from what they called flat book jurisdiction where the sheriff has to go out.

There is a report and he has to carry around the land records to figure out whether he has jurisdiction or not. What happened is that with *Sisseton*, the Supreme Court put us back into a legal posture of pre-1948 legal posture, and said that henceforth the tribal police and the county sheriff had to carry around the county land records.

Chairman ABOUREZK. That is not true in the *Four County* case though, Pete, and I will tell you why.

You are talking about a totally different situation. You are talking about checkerboarded jurisdiction. That isn't the issue within the *Four County* case.

The issue in that particular case is whether these lands, that was a reservation boundary, diminished 70 years ago, in a few year period. Whether those lands ought to be reincluded in the reservation which are not now determined to be reservation by the courts.

Mr. MEEDS. Or Indian country.

Chairman ABOUREZK. They are not called Indian country by the courts, or by anybody else, except in this case.

The question is shall they be called Indian country.

Mr. TAYLOR. There is a legal issue involved here. I will have to accede, since you are from that area, and I am not fully versed on the *Four County* cases.

Chairman ABOUREZK. Being as how you are citing the *Beardsley* case, if I recall, I haven't read that case for a long time now——

Mr. TAYLOR. We are on an equivalent par.

Chairman ABOUREZK. Beardsley was prosecuted for killing his mother and his sister in Todd County—which is not a part of the *Four County* case—and he was prosecuted in Federal court. His argument was he had to be prosecuted in the State court. I think the prosecution stood, because I still get letters from Clarance, from the prison. I don't think they ever released him.

Mr. TAYLOR. It was held in *Beardsley*. The case did originate on fee patent land and it was held that there was Federal jurisdiction, that land was still a part of the reservation.

Chairman ABOUREZK. Which was in Todd County. The other counties that are in question do not include Todd County. In fact, everybody pretty well concedes now that Todd County, even the fee patent land, is all reservation, even the city of Mission, which is virtually all fee patent land, is under Indian jurisdiction and Federal jurisdiction.

But, anyhow, getting back to the principle that we are arguing about, I maintain that I am opposed to this Commission reincluding those lands in this case and the other reservations around the country on the grounds that they have been for so long determined not to be in Indian country.

I am not saying that they are wrongly being asked to be included. I am just saying that the political fight you would start from having whites who have sat there for so long under one system, of reincluding them under the Indian tribal government, would never be worth what we are doing. It just wouldn't be worth it.

It would start too much of a fight.

Mr. TAYLOR. I would like to go back to another point, though, Senator, which again was a subject of discussion in November.

The first assumption, in fact, the basic principle that we are operating off here, is that Indian tribes are not going to assert powers over an area that is beyond their capability to manage or control or have a reasonable basis to the operations of tribal government. That is an assumption.

We are saying that ought to be the basic premise from which Federal law is examined. If all of these counties are, in fact, almost totally non-Indian and they have no reasonable basis for tribal jurisdiction

or for tribal government, I would doubt very much if the tribe would assert tax powers, land regulation powers, all of the different things.

Chairman ABOUREZK. Do you want to bet?

Mr. TAYLOR. Well, we are saying we should operate on that assumption, Senator. We have operated on an opposite assumption for about 200 years and particularly with the Public Law 83–280 situation where we have assumed that the States would act responsibly. The record has not come through that way.

I think that it is time there be a reversal in this process, and let's find out how it works. Let's see if tribes exceed the bounds of reasonableness.

Chairman ABOUREZK. I am not saying that it would be unreasonable for the tribes to do it. From their point of view I think it is entirely reasonable if they tax the jurisdictions over which they have control. That is not unreasonable.

What I am saying is that the political fuss that would result from our decision to do that would not be worth the effort.

Mr. TAYLOR. Well, again I am not——

Chairman ABOUREZK. I am just saying that as one soldier who has been on the front lines out there. It ain't going to work.

Mr. TAYLOR. I am not totally familiar with the four counties that you are talking about. But let's go back to the *Sisseton* case.

I think it is unreasonable that that tribe must constrict the jurisdiction of its own members in its own family relationships, contract relationships, that take place off of a parcel of trust land.

I think the situation has to be rectified. That tribe has just lost some of its sovereignty. I don't want to go on record as saying they have lost it, because they haven't.

Chairman ABOUREZK. They have lost a great deal of it and I think that the Supreme Court decided that way on the basis of an actual statute which is different from the *Four County* case where there is no statute. It just kind of opened up and the boundaries shrunk.

Mr. TAYLOR. It was not the statute alone. It was the legislative history and the facts and circumstances behind it. And that was the purpose of our rule, to say that in the absence of a specific statutory action disestablishing the exterior boundaries of a reservation, the court will not go into legislative history or historic evidence. They will follow the strict face of the statute.

That was the purpose of the proposal. I think the fundamental proposal is good. I am not that familiar with the situation on the *Four County* case you are naming. That probably should go through its course of litigation to see what the posture is. Whether the statute did open it, I don't know.

Chairman ABOUREZK. I don't know if there is a specific statute there or not. I just don't know of any and I am sure that even the lawsuit itself is not operating on that assumption.

What they are talking about is the de facto opening up of that land for white settlements. The fact that it was offered for sale is what they were relying upon to say that the reservation boundaries were mixed.

Mr. WHARTON. That is exactly the difference between the two cases. In the *Sisseton* case they bought the land outright and Congress paid them for it. In the *Rosebud* case, they opened it up for settlement and took the money as they sold it and put it in the Treasury. And that is the distinction between those two cases.

Chairman ABOUREZK. I think that is right.

But I just want to go on record as opposing putting that principle into the Commission's study for the reasons that I gave.

Mr. TAYLOR. Well, it has sort of jumped us ahead of where we were in order to take care of these matters.

We were starting at a point which I would prefer to bring our discussion back to, and I think we should defer a final consideration on this particular rule.

The point that we were at is really a fundamental issue of whether or not Indian tribes have the inherent authority to exercise any jurisdiction whatsoever over a non-Indian.

Now, I think this is the area in which our discussion should be focusing.

Chairman ABOUREZK. What do you want to do with that principle? Do you want to defer it, bring it up now, or what?

Mr. TAYLOR. I think this Commission should enter a recognition of the judicial decision recognizing that tribes do have the inherent authority and of proving the fundamental concept that tribes do have the authority over non-Indians. The full parameters of that should be allowed to evolve through the processes of tribal government. We will see what it is they are doing.

The situation with the Puyallup was raised in the last meeting. If a tribe exceeds reasonable boundaries and goes into things that don't have a reasonable involvement with the operations of tribal government, Congress can act somewhere down the line.

I don't believe that blanket resolutions defining the parameters of tribal powers is a wise thing. We would be operating in a theoretical vacuum. I think too frequently Federal law on Indian questions has been developed on that level. Usually to the harm of tribes.

So, what I would like to see is an agreement on the fundamental principle that tribes do have jurisdiction over non-Indians.

Chairman ABOUREZK. But then you want to defer the question of where the boundaries are to be established. Is that what you are doing now?

Mr. TAYLOR. Well, I am willing to come back to it.

Mr. ALEXANDER. The discussion of the boundaries in this context arises on a rule of construction that the Supreme Court should be using to determine the impact of congressional legislation and the circumstances on reservations.

We have made other recommendations with respect to checkerboard and that involves the establishment of a congressional commission, if you will, or an instrumentality to negotiate and support land consolidation and reacquisition to create, to the extent feasible a consolidated and viable reservation situation.

A lot of that was based on testimony from the same things that you are referring to. That the Federal Government was oftentimes the villain in the situation that led them on to situations inappropriately. And that if a mechanism existed for at least some of these people to be leaving and be brought out at reasonable market value, they certainly would be reasonable to do so.

That is the other component of this issue.

Commissioner WHITECROW. Mr. Chairman, I am not familiar with what took place in South Dakota, but I am quite familiar with what took place in the State of Oklahoma.

If we are talking about the removal of jurisdiction of treaty boundary areas and pulling the jurisdiction on the tribes back into only those trust lands that are still available, that are still held in trust, I am wondering if we may not be abrogating a treaty because these lines, as are indicated on this particular map, as I understand it, those lines of treaty boundaries were never removed. Even though the lands were allotted, they did not specifically remove the jurisdiction of the tribe. Is this correct?

Chairman ABOUREZK. Right. There was no specific removal of the jurisdiction of the tribe. There was a specific shrinking of boundaries, but not by language. The language of the statute just said this is opened up for white settlement and then there were administrative rulings and language later on, but with the Bureau of Indian Affairs saying the reservation boundaries are now here instead of over here because all this land has now gone to the whites.

So going back a little further, Jake, another point of this is that the whites bought into that area with the understanding that they were going to be under State jurisdiction and not under tribal jurisdiction. They just assumed it was another part of South Dakota. That is what they were led to believe.

Now, I don't know what the Indians were led to believe. Whatever the Government did to them, they opened up that land and the Indians sold the land either under whatever duress or whatever else they sold it under.

But the fact is that in Todd County, for example, which is the Rosebud Reservation, there is a lot of fee patented land, but yet the people of Todd County have more or less accepted the fact that the tribe has jurisdiction over all that area and a lot of them are kicking over the fact that there is a new tribal resolution saying they will also have jurisdiction over the whites.

In fact, a lot of the whites are selling out and leaving. But there is more understanding of that aspect than there is of the four county area where the Indians haven't been for 70 years. Now, whether that was wrong or right, back 70 years ago, is something I don't think that we can deal with.

What we have to deal with is the present day situation.

Commissioner WHITECROW. Don't you feel that we have to deal with going back to the original error, the original point or the starting point which this particular situation developed and moved from that particular point forward, rather than this abolishing a specific area of history? Starting from the original point whereby this took place, recognizing that that was the specific area over which the tribe had jurisdiction.

Am I correct in assuming this Commission negotiation that you were referring to would allow the Federal Government to go into that specific area there?

If this Commission recognizes that, as a matter of fact, that was the original geographic boundary, then also recommending a Commission that would also come in and negotiate then with the State, with the tribe, with the Federal Government, negotiating the area of jurisdiction, thereby rectifying these many years of injustice.

Chairman ABOUREZK. Nobody has proposed that kind of commission out there.

Commissioner WHITECROW. Is that what you are recommending?

Mr. ALEXANDER. What we are recommending is a land commission to reacquire and consolidate functional tribal basis and we are careful with the words because the situations are different with each and every tribe.

With some tribes that may mean much more land than they have now. Other tribes may be willing and that is something that they would have to decide and I certainly wouldn't say it for them, to give up claims on areas for other areas or consolidated areas.

But there has to be a mechanism to take into account the at least expressed willingness of some non-Indians residing in these areas to leave, to be bought out at a reasonable price and there are tribal plans already in existence for reacquisition.

The Warm Springs are doing it and other tribes are doing it. There are long-term solutions that required long-term plans that involve the Federal Government, the tribes, and also the States, in negotiation procedures and that is what we are talking about.

Commissioner WHITECROW. I see this as a possible starting point. This Commission, recognizing those original treaty boundary areas, as a beginning point, and to resolve the conflict that you are referring to, Senator. I am at the present time trying to arrange a recognition within the State government of Oklahoma—encouraging them to recognize the powers and jurisdiction of tribal governments. I will be encouraging them to sit down with the Federal Government, the tribal governments, and State governments to negotiate these areas of responsibilities.

Chairman ABOUREZK. There is nothing wrong with that. That is an entirely different question, Jake.

Commissioner WHITECROW. I don't see that it is that much different.

Chairman ABOUREZK. I have got to restate. The problem is I wish you would have drawn the map like we asked last time. It is hard to distinguish now what we are talking about because this map doesn't show it.

What I would like to describe to you is Todd County which is now on all the maps of the BIA and everywhere else as the boundaries of the Rosebud Reservation.

Now, Tripp County, Mellette County, part of Lyman County, and part of Gregory County are in what is known as the *Four County* suit. The Indians have not had majority ownership of the land there. Nor has there been a majority of Indian population for 70 years.

Commissioner WHITECROW. Sounds like Oklahoma.

Chairman ABOUREZK. Probably in those four counties.

Now, once again, we are not speaking whether that was right or whether that was wrong. To open up that for settlement 70 years ago was probably wrong.

But the fact is that people bought that land 70 years ago. The white people who have lived there were led to believe by the Government that that was no longer Indian country. Whether or not there was a specific statute and that they had been living under State jurisdiction for 70 years, and now for this Commission to say we are going to change that and we are going to put you back under Indian jurisdiction would cause the biggest civil war and put you right back in the Indian wars again—right at the beginning.

Mr. YATES. Who did they buy the land from?

Chairman ABOUREZK. From the Indians.

Mr. YATES. They bought it from the Indians originally?

Chairman ABOUREZK. It was under the Allotment Act back then, and the Indian allottees put it up.

Commissioner WHITECROW. Was Indian land taken by the State and sold for taxes? That is one of the main reasons.

Chairman ABOUREZK. No; I don't think so.

Commissioner WHITECROW. The land in Oklahoma was taken by the State under taxation and failure of individual Indians to pay their taxes because they weren't aware that they had to pay taxes. This is specifically true with the Five Civilized Tribes.

Chairman ABOUREZK. Trust land has never been subject to taxation in South Dakota.

Commissioner BORBRIDGE. Mr. Chairman, what I would like to ask of staff is this: It appears to me that we may just be placing ourselves n the position of judging the principle and whether or not there is a legal principle that is sustainable by the facts in terms of whether pragmmatically it is workable in this one specific situation.

I would have to defer as to whether it is workable or not in this specific situation, that is, the four-county situation and Todd County and looking at North and South Dakota.

But the real question I have to ask here is this: Is there a principle which would justify the conclusions we are working toward? If such a principle is sustainable, then the question that I would ask is: Is there then a spectrum of circumstances in which the principle might well be operable? Ranging from those patently unworkable because of current circumstances, because of what people have accepted, because of political situations onto the other end of the spectrum, where the principle may well be worth preserving and actually may be workable.

Thus, I would think of an example where we might have a reservation which may be entirely Indian-owned with the exception of certain parcels, People may be well willing to sell those parcels and you may have a very practical example of what may be done in a consolodation process. In which case, I would state that if I judge from the pragmatic results, the principle is a very good principle because I am able to produce an example where it works. So it appears to me that what we need here is: (1) is the principle sustainable; (2) what are the mechanics that would take into consideration the wide variance of circumstances so that where it is not practical, not pragmatic, and we can recognize that?

In effect, by so doing, the principle itself is preserved.

Staff, is this possible?

Mr. TAYLOR. It seems to me, Commissioner, the principle that you have here, we could accept. But if it is unworkable in the four-county area, it seems to me it is entirely within the power of Congress to redraw those boundaries by a specific act.

If this was the intent 70 years ago, and if the practical effect of that was to diminish those boundaries, then it seems to me that Congress can take appropriate action to redraw that boundary. But I think the basic principle here fits into what you are talking about.

Commissioner BORBRIDGE. The point I want to make is that I would certainly feel that the concern, if the Commission were asked

to take on a situation and base the veracity of workability of the principle in terms of tribal sovereignty over exterior boundaries of a reservation and have to go into a patently unworkable, unfavorable factual situation. But rather if we can develop mechanics to recognize such a situation and, in effect, avoid the confrontation by having the mechanics so established that something practical could be worked out, then where we had a far more favorable, practical situation, the principle of tribal sovereignty and jurisdiction will be there and we can use it.

Do you feel that this can be done?

Mr. TAYLOR. I think the situation among the various tribes is so irregular and so different that it is difficult to come up with a single principle, or single concept, limiting the powers of tribes or try to draw boundaries for them to state.

I think that is what we are getting at when we, in our recommendations here, which is the part I handed out this morning, and what we had in our November meeting. What we are saying is that the Federal policy should be based on the assumption that tribes are going to act with reasonableness and fairness and in a nondiscriminatory fashion.

If unworkable situations occur on specific reservations, that is the time for Congress to take action, but Congress should not be acting in a hypothetical situation to draw limits.

Mr. YATES. What do you do in a case like Senator Abourezk cited?

Mr. TAYLOR. I think that is where Congress may want to take a look at a specific case. But let's concede the legal posture of this thing from Senator Abourezk's standpoint; that the tribes have not been exercising jurisdiction in these areas and that the Federal Government has not.

There are a number of advantages that would accrue to the Rosebud Tribe. No. 1, jurisdiction over its own people so that in these domestic relations situations, even though it occurs in one of these four county areas, those cases would be brought into a tribal court. Foster homes would be placed in Indian reservations.

It doesn't mean that they are necessarily going to try to assert all-encompassing jurisdiction over all parts of these counties. But they would retain their basic powers over their own people, which they lose when their people are outside the reservation.

Mr. YATES. Are you advocating a dual kind of governmental operation? The Indian people to be subject to the jurisdiction of the Indian tribe and the non-Indian people to the governmental authority that exists now?

Mr. TAYLOR. Within some limits that is what I am saying. Yes; that is what we have now. In fact, it is not dual, it is triple. We have Federal, State and tribal.

Mr. YATES. Over those four counties?

Chairman ABOUREZK. Not over the four counties.

Mr. YATES. I am talking about the four counties, specifically, Mr. Chairman.

Chairman ABOUREZK. No. All you have is State jurisdiction in that four county area.

Mr. YATES. That is why I asked him the question. He was talking about Indian jurisdiction over those four counties. Then I asked him what he would do in your case and he said he would have the Indian

tribe have jurisdiction over the Inidan people for certain purposes. If I understood him correctly.

Mr. TAYLOR. I am assuming the tribes would limit themselves to that.

Mr. YATES. Like in personal relationships: marriage, divorce—things of that sort—and adoption. You would take that away from the State jurisdiction then, which apparently now has it in the four counties, unless I am wrong.

Is that right?

Chairman ABOUREZK. Yes. They do have it.

Mr. YATES. Then you propose to take that kind of jurisdiction away from the State. Is that right?

Mr. TAYLOR. It was not my knowledge or understanding that the State had been exercising that. If that is the situation, Mr. Yates, yes, I would take it.

Mr. YATES. To what extent would you take it away? You talk about the interpersonal relationships. What other aspects of sovereignty would you take away? You wouldn't take the taxing authority away?

Mr. TAYLOR. Away from the State?

Mr. YATES. Yes.

Mr. TAYLOR. This gets us into another area that we have some questions about.

Chairman ABOUREZK. I think we are approaching this thing backwards. We are starting from the backend of the whole thing.

What we have to establish, first of all, is what you mean by tribal jurisdiction within the Indian country. Then you have to determine the Indian country after that.

Mr. TAYLOR. Right. I intentionally brought the maps on first because Mr. Meeds was absent and this question of the fundamental principle of tribal jurisdiction over non-Indians is a matter that I know you are keenly interested in and you want to vote on it when we call the issue.

Mr. YATES. He goes beyond that, Mr. Chairman. He said not only what is Indian country but what should be Indian country.

Chairman ABOUREZK. That is, in essence, what our discussion has been about here.

Mr. TAYLOR. I didn't think that what we were proposing was an expansion of original reservation boundaries or the boundaries that they wound up with.

The State is saying this is an expansion. The Indians are saying no, those are where the boundaries were drawn originally. The rule that we are seeking here and, as you say, we are at the back door where we ought to be at the front, but the rule is to avoid the Sisseton-kind of situation where reservations are found to have been disestablished.

But I really think the starting point is at the front door, which is the basic concept of tribal jurisdiction over non-Indians.

Chairman ABOUREZK. Another thing about Sisseton, that you didn't mention, was that for roughly that same 70 years, Sisseton had been operating as a State jurisdiction thing. Then a lower court decision came along 2 or 3 years ago, or 3 or 4 years ago, saying no, the boundaries are reestablished, and the tribe operated with almost

total jurisdiction within that area for 2 or 3 years until the case got up to the Supreme Court where it was reversed and then it went back into what it was before.

Mr. TAYLOR. This sort of fits into the historical pattern that we started with this morning. What you are saying, I believe, is true. The Sisseton government has sort of come back into being.

When it was originally opened up, the problem, as far as the Indian agent was concerned, who was filing his reports, was that they couldn't get the States to take jurisdiction over Indian cases. The State refused to do it because Indians weren't paying taxes and they said we are not going to expand prosecutorial funds and funds for judges and police when you are not paying taxes to do it. They preferred to leave it lawless.

So the problem started from an opposite point of where it wound up.

Mr. YATES. Don't you have to leave the uncertain areas out of our report and just talk to the question of jurisdiction over Indian country without getting into the controversy of whether or not it is Indian country or isn't Indian country?

That is something that I think has to be decided at a later time either by Congress or by the court.

Mr. TAYLOR. I am inclined to agree with you, Mr. Yates.

Mr. YATES. I think it has been a helpful discussion and I think this is the way it has to wind up temporarily. Leaving for the court or the Congress the decision as to whether or not it is Indian or non-Indian country.

Chairman ABOUREZK. What Pete is saying is: We ought to recommend to the Congress and declare in South Dakota, for example, that four county area is Indian country. He is asking for a specific statute.

Mr. YATES. I didn't know that he was asking that.

Chairman ABOUREZK. Yes; he was. Last time he was.

Mr. TAYLOR. That is right. It was in the recommendation which is what led to these maps.

Mr. YATES. Isn't that a controversy we ought not to get into?

Mr. TAYLOR. It is certainly a controversy.

Mr. YATES. I recognize that. But that isn't what I asked you

Chairman ABOUREZK. I think we ought to get into it and I think we ought to settle it. I will tell you another thing and I know this for a fact in South Dakota—I don't know about the others—but there is a group of rednecks operating down in South Dakota. They are organizing nationally, and are fighting hard as hell for State jurisdiction over all Indian country.

Mr. TAYLOR. Several States are.

Chairman ABOUREZK. And it is spreading to other States.

Mr. TAYLOR. Which I think is what this Commission is about.

Chairman ABOUREZK. If the Supreme Court comes down and claims that that four county area is within Indian country, or if the Congress did it, you would see things moving rapidly both nationally and in the various States. A movement for State jurisdiction so that the Indians are going to wind up losing more sovereignty than they ever started out with.

Mr. TAYLOR. With the response to the *Four County* case, a diminishment of Indian country throughout the United States or would Congress direct its action directly to the four county area?

Chairman ABOUREZK. Oh, no; I think it would be a nationwide movement.

Mr. TAYLOR. I guess that our proposal was intended to be nationwide as far as Indian reservations are concerned and put the burden back onto the Congress.

Chairman ABOUREZK. You have canonized a political situation that I am not sure Indians want. That is what I am saying.

Mr. TAYLOR. I think maybe Mr. Yates has hit the solution here. Perhaps this is a controversial area that we should not be getting into.

Chairman ABOUREZK. Well, I don't like it. I don't think we ought to shy away from something just because it is controversial. I think we ought to deal with it.

Mr. YATES. How do you deal with a situation like yours in the four counties where he thinks it is Indian country and you don't?

Chairman ABOUREZK. Well, we decide it.

Mr. YATES. You are going to have to have days and weeks and months of hearings, aren't you, on something like that?

Chairman ABOUREZK. Maybe. Maybe not. Maybe we can decide it without that.

Mr. YATES. We are not going to decide it in a half an hour or an hour of hearings before this group of Commissioners. So how can you decide—as a matter of fact, if I understood what you said, it is before the courts now.

Chairman ABOUREZK. It is before the Supreme Court.

Mr. YATES. Why should we decide it now?

Commissioner BRUCE. Mr. Chairman, we also have other situations. Take the Oneida situation. You are talking about an emotional, political situation. None of those people in that area—a lot of them have old farms, and mine is not far away—that were never purchased in the first place. Not from the Indians, just taken.

Now, they are uncovering all of these and it is a hot situation in that whole five county area. People who have owned farms for a long time say, "Shall we sell out?" How do we deal with that kind of thing?

I think we are facing the same thing in Maine. And the Maine people are saying, "Do we own our property that we have had all these years?" And yours is a different thing, which I know about very well.

Mr. Chairman——

Chairman ABOUREZK. Adolph, didn't you ask for recognition first? Let me call on him.

Mr. MEEDS. All right.

Commissioner DIAL. I certainly understand, Senator Abourezk, your position and I follow what Pete is saying based on principle and I suppose also based on law. But I also understand that we will never deal with this today. We haven't taken a vote in this meeting and certainly we shouldn't take one on this at this time.

I feel that we should pass on to something else.

Mr. MEEDS. Mr. Chairman, as I understand it now, the definition of Indian reservation is really a question of fact, whether or not the original boundaries have been diminished by specific acts of the Congress, by other acts which by a court can be interpreted as a dimunition of the boundaries. That is where we are now. That is the present status.

Mr. TAYLOR. That is correct.

Mr. MEEDS. It is my further understanding that this group is suggesting that we have a definition of Indian country or reservation which will include the original historic boundaries of reservations unless they have been diminished by a specific congressional act. Is that correct?

Mr. TAYLOR. Our proposal in November used the word original. We have drawn these maps in order to show where original boundaries were and I think the word "original" should be taken out.

Chairman ABOUREZK. You include the four counties in this?

Mr. TAYLOR. Yes.

Mr. MEEDS. This kind of definition would also include the city of Tacoma under the jurisdicition of the Puyallup?

Mr. YATES. Only three-quarters.

Mr. MEEDS. Well, if the shoe fits——

Mr. TAYLOR. Under the rule of the proposal, Mr. Meeds, it would include that. In fact, a court decision has so held and in the absence of——

Mr. MEEDS. The city of Tacoma is or was what we would now classify as a reservation.

Mr. TAYLOR. The Puyallup Reservation and the rights of an individual to fish off of a municipal bridge in the river was the point that was at stake. That if that reservation didn't exist, that man had no right to fish. These are the consequences of saying that a reservation doesn't exist.

You know, we are not only taking away these potential powers of the tribes, but we are also taking away minor points that I don't think any of us would want to take away.

Mr. MEEDS. Then if you combine this definition with what you are going to further suggest, should be one, the sovereignty and jurisdiction over certain subject matters.

As I recall from our last meeting, you are going to have the city of Tacoma under tribal jurisdiction for criminal actions—for zoning, a totally impossible situation.

Mr. TAYLOR. As you describe it, it clearly is. There is no question about it. We agreed with that last time and our followthrough point on this is that, as you pointed out this morning, Congress has plenary power.

If they see a tribe take an action like that, the solution to it—as Charley has pointed out—lies within 24 hours.

Mr. YATES. What is the solution within 24 hours?

Mr. TAYLOR. They could virtually terminate the tribe.

Mr. MEEDS. A solution which will much better allay and even prevent the kind of problems which Senator Abourezk stated would happen, with which I agree wholeheartedly. And that is to either: Have a more restrictive definition of what a reservation is; more restrictive definitions of what sovereignty and jurisdiction are within those areas; and then, on an ad hoc basis, extend that.

Mr. TAYLOR. Mr. Meeds, as a practical matter, I doubt very much if Congress would ever put those things through.

Mr. MEEDS. Let me suggest to you that, as a practical matter, I doubt very much that Congress would ever pass the kind of definition of reservations that you are suggesting.

Mr. TAYLOR. The Supreme Court has enunciated it twice in *Mattz* v. *Arnett*.

Mr. YATES. What is the citation of *Mattz* v. *Arnett*?

Mr. WILKINSON. We will have you that in a second.

Chairman ABOUREZK. I think I am going to exercise the chairman's prerogative by cutting off this discussion for the time being. We have got a lot more we have to move on to, and I think while it is a good discussion, we are still under time limitations.

Mr. YATES. I would like that citation.

Chairman ABOUREZK. Give the citation. We will move onto the next principle.

Mr. MEEDS. The citation for what?

Mr. YATES. On *Mattz* v. *Arnett*.

Chairman ABOUREZK. Pete, could you just write them out and hand them to Sid? Wouldn't that be a lot faster?

Mr. MEEDS. I would like to get them also, Mr. Chairman.

Mr. YATES. Jim, it will take him 5 seconds to do it.

Mr. ALEXANDER. They are in the material on page 39.

Mr. WHARTON. The citation for *Mattz*——

Mr. YATES. Did you just give us a citation?

Mr. WHARTON. It is 412 U.S. 481.

Mr. YATES. One of them or all three of them.

Mr. WHARTON. *Mattz* v. *Arnett*, sir.

Mr. TAYLOR. There is another case, *City of Newton* v. *U.S.* It is 454, Federal 2d, 121, 8th Circuit, 1972.

And then this third case, *DeCoteaux* is 420 U.S. 425, 1975.

Mr. MEEDS. How about *Tacoma* v. *Abourezk*?

Mr. YATES. Thank you, Mr. Chairman.

Mr. TAYLOR. Mr. Chairman, in response to the ruling you have just made, I would now like to leave the back door and come back to the front door because I think this is a point that we have got to have a resolution in order to move forward in this chapter.

Mr. YATES. What is the point that you have to have a resolution on?

Mr. TAYLOR. The point is the fundamental question of whether or not tribes have jurisdiction at all under any circumstances over non-Indians.

Mr. YATES. Non-Indian territory?

Mr. TAYLOR. Within Indian country. Yes; or within an Indian reservation. The terms are rather interchangable.

We talked this morning some about the necessity. We spoke of the *Belgarde* case. We spoke of the *Oliphant* case with two factual pictures.

I think that demonstrated the need for governmental authority within Indian reservations. I think this is really the critical issue that is at stake here.

We have numerous situations. Paul mentioned a couple. Judge William Rhodes of the Gila River Reservation began exercising jurisdiction over non-Indians about 4 years ago. He has run several thousand cases through his court. How many of those involved non-Indians, I am not sure, but I would say several hundred.

He hasn't had a single appeal in the U.S. district court challenging his jurisdiction.

Mr. YATES. How many murder cases?

Mr. TAYLOR. I don't know of any.

Mr. YATES. The question that comes to my mind immediately is: What would be the limits on that jurisdiction? Would there be any limits on jurisdiction over the people or all people on Indian territory?

Mr. TAYLOR. At the moment, Mr. Yates, there is a limitation on the penal power of the tribal court.

Mr. YATES. What is your proposal?

Mr. TAYLOR. I don't know that we have a proposal on removing those limitations. I will let Paul address that in a second.

The current limitation is a fine of $500 and/or 6 months in jail.

Mr. YATES. Don't we have to know, before we resolve that question, as to what the limits are that you propose of jurisdiction of the tribe over the people who are on that land?

Mr. TAYLOR. There was a recommendation to increase the penal power of the court from $500 to $1,000 and the sentencing power from 6 months to 1 year.

Mr. YATES. Do you propose to remove the jurisdiction of the BIA and the Federal Government?

Mr. TAYLOR. No. In fact, with the limitation of the penal power, I think it is critically important that the Federal Government retain concurrent jurisdiction with the tribes over major offenses.

Again, it takes us back to the separate sovereignty question.

Mr. YATES. I must confess I am somewhat confused. When you talk about Indian control, Indian sovereignty over Indian country: What is that control that you are talking about?

You indicate that there would be the three forms of control that would continue. You would have Federal and you would have the BIA and you would still have Indian. What is the limit of the Indian control to be if the other forms of control are still to exist?

Mr. TAYLOR. The BIA and Indian control are identical. Either it is the Bureau of Indian Affairs police force or the tribal police force.

Mr. YATES. You would eliminate BIA and you would only have two then?

Mr. TAYLOR. Either BIA or tribal. Under the current law, *U.S.* v. *McBratton* and *Draper* v. *United States*, the States have been held to have exclusive jurisdiction over offenses by one non-Indian against another.

Mr. YATES. In Indian country?

Mr. TAYLOR. Within Indian country. I think there may be a modification of that rule in the offing which would relate to offenses that are committed in the situation where either life, limb, or property is jeopardized.

In fact, the *Oliphant* v. *Schlie* case—well, not *Oliphant*—the *Belgarde* case was a driving case. You might call it a victimless offense. Happily, he didn't run head on into anybody and kill them.

But, at any rate, States do have a measure of jurisdiction within Indian country, even in a closed reservation.

Mr. YATES. But you are asking us to take a position on a principle. What is the principle that you want us to take a position on?

Mr. TAYLOR. That tribes do have jurisdictional power over non-Indians within Indian country.

Mr. YATES. For all purposes or as the law exists at the present time? Where the States can intervene and the Federal Government can intervene.

Mr. TAYLOR. I think this commission can endorse the decisions in *Oliphant* and *Belgarde;* that endorsing the concepts that the tribes do have jurisdiction and it is for all jurisdictions. It is not just criminal. It is civil and it is on down the line.

You raised the point this morning about the Papago Tribe having tax authority if non-Indians are attending the Papago school system. That requires tribal jurisdiction over non-Indians.

Regulation of criminal conduct requires criminal jurisdiction.

Mr. YATES. All criminal conduct?

Mr. TAYLOR. Yes; I think so. Subject to the limitations on the power of the tribe. As a practical matter, I would think on most of the major offenses where a non-Indian is involved, the tribes are going to want the Federals to take it.

Mr. YATES. But you would eliminate State control, then? You would have just the Indian and the Federal?

Mr. TAYLOR. No; I don't think I said that.

Chairman ABOUREZK. Sid, would you yield?

Mr. YATES. Yes.

Chairman ABOUREZK. Pete, I think it would be useful for most, if not all the members, of the Commission to just very briefly sketch the basis of jurisdiction on a reservation right now. Where does it start? Does it start with the Federal Government or with the tribe?

And then explain how it is shared after that.

Mr. TAYLOR. You have a three-way jurisdiction: Federal, State, and tribal. Originally, you had tribal. Federal jurisdiction was extended into Indian country probably as early as 1802. Certainly by the 1834 act. And, in fact, the 1834 provision is still on the books today. It is 18 U.S.C. 1152.

That extended the Federal laws applicable within a Federal enclave like a military enclave where there wasn't a State authority. It extended those Federal laws into the Indian country.

The objective of it, I think, as we point out in the textbook material, was to get a Federal presence there where we could fulfill some of these treaty commitments without punishing non-Indians that commit offenses within that Indian country.

In fact, I believe the legislative history will reflect the need to do this.

It also extended jurisdiction, not only over non-Indians that offend against Indians, but also over Indians that offend against non-Indians. And, as Mr. Meeds pointed out, it was to have this buffer zone between States and tribes.

It was a way of maintaining peace in the Indian country, and on the frontiers.

Then, in 1885, the Federal Government enacted the Major Crimes Act which now has 14 major felonies. That was 1885.

The *Pratney* case was decided in 1896 and then we had *Draper*—and even if that offense occurs within Indian country, if it does not involve an Indian, if it is a non-Indian against a non-Indian, then the Federal Government has no jurisdiction. It is exclusively State.

Now, I don't know where these offenses occurred. In fact, the picture doesn't show it. You know, it is two guys clear out in the badlands somewhere and they fight it out. There may not be any tribal or Federal duty to protect the tribe involved.

But, at any rate, we have got those two decisions which I think are subject to modification. But, essentially, what we have today is exclusive tribal jurisdiction over their own members if it is an offense by one Indian against another Indian, except if it is a major crime—a murder, a rape, or arson. There are 14 of them that have been defined. Then it is a Federal offense.

The Federal jurisdiction also pertains if it is an interracial incident. If it is an Indian against a non-Indian or a non-Indian against an Indian, then there is Federal jurisdiction. There may also be tribal over the Indian.

The question is whether there is also going to be tribal jurisdiction over the non-Indian.

Then we have our third tier, which is the State jurisdiction over the non-Indian against non-Indian. So that is the jurisdiction picture on criminal law.

Chairman ABOUREZK. And on civil law it is all tribal jurisdiction within the boundaries of the reservation if it is Indian dealing with Indian.

Mr. TAYLOR. Or if it is a transaction of an Indian with a non-Indian. That is what *Williams* v. *Lee* was all about.

Mr. WILKINSON. Except, of course, for Public Law 83-280.

Chairman ABOUREZK. Well, yes, but we are talking about——

Mr. WILKINSON. I think the basic point, I guess, is there is a starting point. That there is exclusive tribal jurisdiction, but that Congress has plenary power to change that jurisdictional pattern; and that it has changed that pattern in many of the ways.

Chairman ABOUREZK. Now, understanding it: What is your recommendation to the Commission, Pete?

Mr. TAYLOR. I am sorry.

Chairman ABOUREZK. What is your recommendation to the Commission? What policy should we adopt on jurisdiction within Indian country?

Mr. TAYLOR. I think that this Commission should acknowledge these Federal decisions that have come down on this, recognizing tribal jurisdiction over non-Indians and this Commission should endorse that principle in principle.

Chairman ABOUREZK. In fact, that is the only principle that you are asking us to acknowledge right now.

Mr. TAYLOR. At this point. And then, as you have pointed out and Mr. Yates has pointed out, how far that extends geographically is a separate question.

Chairman ABOUREZK. All right. I understand that. You are not asking that the tribes take over the 14 major crimes jurisdiction?

Mr. TAYLOR. What I am saying there is that they could exercise concurrent jurisdiction with the United States and there is a practical reason for this. Paul pointed out the delays in FBI investigation. It may be 24 hours. It can be as much as 3 weeks before an FBI agent gets out there to investigate one of these major crimes.

In view of the separate sovereignty thing, there appears to be no reason why tribes should be precluded from exercising this kind of jurisdiction and, in fact, it is destructive to law and order in Indian country.

Chairman ABOUREZK. Let me get this a little more clear. You are asking now that the tribes have jurisdiction over non-Indians for all offenses within Indian country. Are you asking then that State jurisdiction be irradicated over those non-Indians living within Indian country?

If you are asking for concurrent jurisdiction between State and tribal governments over non-Indians——

Mr. TAYLOR. Not to the exclusion of the tribes when it is a situation that has a tribal involvement.

Take the *Oliphant* case——

Chairman ABOUREZK. Let me stop you. The only real change you are asking for is that where a non-Indian commits a crime against an Indian, instead of the Federal Government trying him, it would be the tribal government trying him.

Mr. TAYLOR. Where a non-Indian commits a crime against an Indian, yes. That is correct.

Chairman ABOUREZK. That is the only real change you are asking for. You are saying you don't want to effect State jurisdiction over white versus white. Right?

Mr. TAYLOR. No, I don't want that.

Chairman ABOUREZK. And, obviously, since the tribes have jurisdiction over their own members, you are not changing that because that is what you are asking for anyhow.

Mr. TAYLOR. That is correct.

Chairman ABOUREZK. So the only real change is a crime of a white committed against an Indian or a non-Indian against an Indian; you are asking for a change. Am I correct there?

Mr. TAYLOR. Well, actually, we are not asking for a change. We are asking for an endorsement of the decisions that have thus far been laid down.

This is a brandnew area, you know, that tribes are getting into.

Mr. MEEDS. Mr. Chairman, may I ask a question at this point?

Chairman ABOUREZK. Go ahead.

Mr. MEEDS. What do you suggest we do about the Indian Civil Rights Act, which restricts the fine and the imprisonment to $500 and 6 months for murder?

Mr. TAYLOR. Congressman Meeds, under the present separate sovereignty concept, that does not preclude the Federal Government from prosecuting that case subsequently. There is no double jeopardy.

Chairman ABOUREZK. He didn't ask you that. He asked you what you would do about the Indian Civil Rights Act.

Mr. TAYLOR. Let the tribes put the murderer away for 6 months. If we say they don't have the power, then they don't even have the power to put them away for 6 months.

Chairman ABOUREZK. Pete, answer the question. Do you leave the Indian Civil Rights Act stand where it is or do you abolish it?

Mr. TAYLOR. All I said was that another portion of this report recommends the penal power of a tribe be increased from $500 to $1,000. I know that S. 1 amended would increase it to $5,000 and that the imprisonment power be raised from 6 months to 1 year.

I do not recommend to you that we take off those limitations on ultimate penal power of tribes. At least certainly not at this time.

I am recommending that the tribes not be precluded from exercis-

ing jurisdiction in this area. I am recommending that what I consider to be the present policy of separate sovereignty, not be disturbed so that subsequent Federal prosecution can occur. Tribes don't want to take a murderer and punish him 6 months and know that he won't be punished anymore.

But they may want to get that guy off the streets while the Federal court ponders its way through its caseload and eventually gets to the case.

Mr. MEEDS. They may even want to compensate his widow and let it go at that.

Mr. TAYLOR. That might not be a bad idea.

Mr. MEEDS. In principle it may not be a bad idea, but that is how we got into this problem initially, you will recall, when that was the forerunner of the Major Crimes Act application in Indian country.

Mr. TAYLOR. Of Indian law, yes. That is correct.

Mr. MEEDS. The application of Indian law for murder, they compensated the widow under Indian law and there was such an outrage that this was the punishment that was given, that the Major Crimes Act was enacted and applied to the Indian countries. Is that not correct?

Mr. TAYLOR. Of course, the sequel to that—well, it wasn't that Indian law was applied and this man wasn't going unpunished under Anglo concepts and the sequel occurred about 2 years later when an Indian tribe had punished a murderer with execution, the executioners were tried for murder because they didn't have jurisdiction to do it.

Mr. MEEDS. I want to get to an even more——

Chairman ABOUREZK. Could I finish my question, please?

There is, I think, one other area that you are probably asking for a change which I don't think that you have made specific and that is the area of civil transactions within Indian country. The situation now is that the tribal boards have jurisdiction over all civil transactions between Indians and Indians.

Mr. TAYLOR. That is correct.

Chairman ABOUREZK. And they do not have jurisdiction over civil transactions between Indian and whites. Am I correct in that—unless the non-Indian white submits to the jurisdiction of the tribal court.

Mr. TAYLOR. That has been the traditional position, Mr. Chairman. I think that as a result of *Williams* v. *Lee* and the explanation of that case contained in *U.S.* v. *Massery,* the voluntariness of submission may no longer be a pertinent question.

Chairman ABOUREZK. But we should set out a third principle on that, nevertheless; shouldn't we?

Mr. TAYLOR. I think recognition of tribal jurisdiction over non-Indians in the case here.

Chairman ABOUREZK. Would that include, then, jurisdiction over civil transactions between non-Indians?

Mr. TAYLOR. No; it would not.

Chairman ABOUREZK. It would still leave that to the State, of course.

Mr. TAYLOR. That is correct.

Chairman ABOUREZK. So, in effect, what you are saying is that all these decisions, some of which have been pretty hasty, should be cleared up and ratified by the Commission?

Mr. TAYLOR. I would like to see a congressional stamp of approval on that legal concept.

Mr. MEEDS. Mr. Chairman, I would like to pursue the question of criminal jurisdiction a little further. Let's assume that we accept and the Congress passes or puts in practice the recommendations of the Commission and a non-Indian is arrested on a reservation for commission of a crime, is incarcerated and tried in an Indian court and he asks for the tribe to furnish counsel for him, citing the sixth amendment to the Indian Civil Rights Act.

And the court says: "No, you are not entitled to counsel under that section. You would be under the sixth amendment of the U.S. Constitution, but you are in Indian country, under tribal jurisdiction, and the Indian Civil Rights Act doesn't guarantee that right."

I am sure you will agree with me. I am citing a case.

Mr. TAYLOR. I agree with you.

Mr. MEEDS. OK. At that juncture, then, you have a citizen of the United States, non-Indian deprived of the civil rights to which he would be entitled in any other place in the United States, except on an Indian reservation.

Mr. TAYLOR. I am not sure if that is true, Mr. Meeds.

Mr. MEEDS. What other place would it be?

Mr. TAYLOR. Perhaps in a U.S. district court in front of a magistrate trying a petty offense, the jurisdiction of which extends to 6 months in jail or $500 in fine.

I don't believe the Supreme Court has made any decision that a person in a petty magistrate court is entitled to free legal counsel.

Mr. WILKINSON. That recommendation will be made later, along with a recommendation that the maximum penalty of Indian courts be increased from $1,000 to 1 year or $5,000. And along with that there will also be a recommendation that when serious penalties are involved that counsel will be provided.

Mr. MEEDS. Are there any other portions of the Civil Rights Act which do not guarantee all the rights of the first 10 amendments?

Mr. WILKINSON. Grand jury is not required, which would seem to be a technical matter. But that wouldn't apply to the States in all situations either. I can think of no other areas right now in a criminal trial that it wouldn't apply.

Mr. TAYLOR. I think the one area there might be some question on is the extent to which the 1968 Civil Rights Act brought into the tribal setting all of the case law that has developed.

Mr. MEEDS. Well, indeed the right to counsel has developed pretty much through case law. The sixth amendment interpretation.

Mr. TAYLOR. But the 1968 Civil Rights Act specifically was worded in such a way as to avoid that, as far as the tribes are concerned.

Mr. MEEDS. Let me just say very quickly and very clearly that I will be opposed to any extension or any recommendation which will deprive American citizens, white or nonwhite, of any of the protections of the U.S. Constitution wherever they are in the United States, Indian reservations or otherwise.

Mr. MEEDS. Is there any disagreement with that?

Mr. YATES. Are you fellows in favor of that, too?

Chairman ABOUREZK. The question is: Are you for the Constitution or against it?

Mr. YATES. That is right.

Mr. STEVENS. It depends on what we are talking about.

Mr. MEEDS. Maybe we ought to get their response to that.

Mr. TAYLOR. What the 1968 Civil Rights Act did was bring into play the tribal court setting fundamental principles of fairness. And what the U.S. Supreme Court has done with our Constitution is embroider in some very hard and fast rules, like the *Miranda* rule, where Sergeant Friday goes around monitoring; and they set this up as a mechanical condition precedent to the admission of confession evidence.

My position is that that 1968 Civil Rights Act did not necessarily bring into play these mechanical kinds of procedures. The basic fundamental protections of those 10 amendments—due process, equal protection of the laws—those concepts were brought in.

Also, there was a congressional stamp of approval of what was the *Colliflower* case which preceded the 1968 Civil Rights Act allowing the Federal court to take habeas corpus jurisdiction over a conviction in traffic court. The 1968 Civil Rights Act statutorily defined that so that now it is in the statute, and appeal for violation of any of those rights set on in that 1968 Civil Rights Act can be taken to a Federal judiciary for review. I think that review should be premised on the four corners of the record, the fundamental fairness that took place not on procedural niceties such as dominates our courts and is bringing our courts down, in fact.

Mr. YATES. The question is: What happens to the four corners in the four counties? What is your answer to that question? Are you going to deprive M. Meeds, a constituent who happens to commit this crime in Indian country of his right to have the counsel that he wants? Are you going to deprive him of any other constitutional right to which he is entitled in a non-Indian court?

Mr. ALEXANDER. I think we have to focus a bit on the context of how those rights, as we define them, may operate in the Indian court context. This gets us to the notion that Indian courts and justice systems: (1) they are evolving institutions which is very fundamental in that whole notion of tribal justice; and (2) that Indian governments will operate reasonably and rationally.

What is going on in Indian court systems today is a major training and upgrading program of judges and a lay advocate system that the American Indian lawyers training program is developing. Now what may in fact happen is there will be counsel in Indian courts available. It may not be the same counsel given the same standards that the State of South Dakota would recognize to its bar, but it may be counsel that is recognized to the bar of the Navajo Nation.

Mr. YATES. Then your answer is, yes, then.

Mr. ALEXANDER. It has to be the variation of those systems and any jurisdiction. It is a question of jurisdiction again. It has a right to determine who is admitted to its bar. If the Indian court system individually develops specific training programs for lay counsel, which in fact they are doing right now, that should take care of it. We shouldn't superimpose the notion of the 3 years of law school, whatever that is worth.

Chairman ABOUREZK. Paul, we haven't even gotten to that question yet. The question really is this. Is there going to be some specific

guarantee of these constitutional protections? We will get to the question of adequacy of counsel at some other point.

Mr. WILKINSON. Senator Abourezk, there really is, I think, a full answer to this. In 1968 Congress took up the specific question in a bill developed mainly by Senator Ervin, one of the great civil rights defenders, literally, in the history of this Congress.

Chairman ABOUREZK. Not in the view of the Pueblos.

Mr. WILKINSON. Not in the view of the Pueblos but, notice it was Indians and not civil rights people who opposed that action. He developed an act that is going to provide exactly the guarantees that you are talking about. Those provisions have not been opposed by civil rights people in Indian courts since and the only provision I see that needs to be changed is the one Congressman Meeds raises about the rights to retain counsel which can be changed by taking out one word of the statute.

Other than that you have got a statute that meets the objectives.

Commissioner WHITECROW. Mr. Chairman, may I make a comment here?

The question as to whether or not we support the Constitution of the United States—I don't think there is any question about that. Each one of us took an oath to support the Constitution of the United States.

Mr. YATES. But, Jake, there was such a question that was raised by the learned counsel at the bench there.

Commissioner WHITECROW. It has been my impression, in regard to all of this presentation that has been made, that there is no attempt whatsoever—with my relationship with various Indian leaders around the country, it has not been such whereby they want to deprive any individual American citizen of his rights.

Mr. MEEDS. Will you yield at that point?

Commissioner WHITECROW. I don't feel that we are going to deprive any individual American citizen of his rights. Certainly citizens need to have those rights. However, with the exception of voting—and I think that is what you are going to get to—in the voting privileges, let me cover that insofar as that is concerned.

Mr. MEEDS. As a matter of fact that is not what I was going to get to. I was just going to ask the Pueblos how they feel about freedom of religion.

Commissioner WHITECROW. Freedom of religion?

Mr. MEEDS. Yes, and they will tell you rather straightforwardly that they don't feel there should be the first amendment of the Civil Rights Act amendments because they don't believe in freedom of religion and they are very frank and forward about it.

Mr. WILKINSON. Congressman Meeds, they don't believe in a prohibition against establishment of religion. They are very strongly in favor of freedom of religion.

Mr. MEEDS. I guess that might be a more accurate statement of religion. Then they are very strongly in favor of a state religion.

Chairman ABOUREZK. Let me ask the staff a question. You are asking us to adopt that principle of jurisdiction we have discussed here for a while. What else is there to be taken up today? Is that the whole chapter? Is that the basic principle right there?

We have got about 40 minutes left and that is why I say that.

Mr. TAYLOR. Senator, there are a number of other portions of the chapter on jurisdiction, or of tribal government. In the area of jurisdiction I believe this is the element we would like to see adopted today.

Chairman ABOUREZK. In other words, we can't finish this today. Do we have another meeting scheduled tomorrow?

Mr. STEVENS. No.

Chairman ABOUREZK. So we are done until February if we don't finish today. All right. Let me ask one more question. What are you asking us to do in the area of taxing authority: liquor licenses, hunting licenses, fishing licenses, and things like that?

Mr. TAYLOR. We feel that is within the purview of the concepts under debate right now.

Chairman ABOUREZK. So what you are saying is you want to vest in the tribes jurisdiction to charge for hunting licenses over non-Indians and Indians alike. They can license liquor stores, bars, grocery stores, everything on the reservation.

Mr. TAYLOR. That is correct.

Chairman ABOUREZK. Within Indian country, whether it is on fee patent land or not?

Mr. TAYLOR. That is correct.

Mr. WILKINSON. In our judgment that is a clarification of existing law, not new law.

Chairman ABOUREZK. I understand.

All right.

Mr. YATES. I have less problem with that portion than I do with the criminal portion.

Commissioner BRUCE. Mr. Chairman, I would like to hear what Ernie Stevens is trying to say.

Mr. STEVENS. Thank you, sir.

Chairman ABOUREZK. Well, let's take a vote on it.

Mr. STEVENS. Ordinarily it might be better not to bring something like this up from my point of view because we have the law on our side now. For my part, as an Indian person, I would be prepared to have my peers, my fellow Indians, meet your peers in a court of law, because we are doing right well. The Indian people are now in a position where we are assuming jurisdiction. We are no longer content to call in the FBI. We are no longer content to let non-Indians have a few drinks and go crazy.

We are assuming jurisdiction. I am referring to that case in Washington State. You give the non-Indians a few drinks and they go crazy.

The point is that if it were let alone in many ways, to even discuss the thing is harmful to the Indian people because we feel secure in the law as it exists. To discuss it here is to possibly give people the impression that we're asking you to make law, and we are not asking you to make law.

The Indian people feel—and I think the attorneys present here support the position—that we have a pretty steady position within the law.

I think it should be clarified that we are not trying to assume a four county jurisdiction. We are not trying to take over Tacoma. The principle that we are trying to lay down—we are talking about the non-Indian business person who sits in the heart of a predominantly Indian-controlled country and refuses to give a "by-your-leave" to

the tribe, to a cattle rustler, to a person who gets drunk and disorderly, to people that ought to be subject to it.

I feel like we were discussing this in many ways in the wrong context. I didn't hear any discussion of any particular case that was on the side of what we were proposing. Related to that, the reason that I think it is worth pursuing, is because if this really solid Commission can't deal with the subject in some sort of an equitable fashion on behalf of the people in the four counties, on behalf of people in Tacoma and also on behalf of those of our people who need to have some weight on their side, then I don't know how we can expect Indian or non-Indian to act responsibly.

I want to clear our motives. Our motives are to clarify it in some way to relieve some of the agitation.

We were not trying to propose something, although I know how you feel, to cause trouble. We feel that Congress ought to at least consider the question and basically we are asking for something on this principle. I think that even could be deferred to next time. I think it is worth it, and let's pursue it.

Chairman ABOUREZK. Ernie, I don't care if we vote it up or down today; it is fine with me. I don't want to avoid any of those issues. I think we ought to deal with them. If I disagree with it, I will vote against it, and conversely.

Now you bring up a point, that the Indians are winning their cases all over the country in court. I think that is true. And you bring up a point that there is a bit of apprehension that if you bring it into the political arena you might start losing, and that may or may not be true. I don't know.

So that is an issue that we may want to take up here today. Do we just give a general policy statement and say that the Commission ratifies all these court decisions? Or, do we come out and make a flat statement that we ought to have jurisdiction over everybody in sight on a reservation? Do it that way and take the chances that you bring up.

What do you want to do? What do you think we ought to do?

Mr. WILKINSON. Mr. Chairman, one thing that I would suggest along that line is that perhaps to treat the general principles in the jurisdiction area—I am not talking about the Indian country problems—but treat them in the way we treated the trust relationship. In other words, for this Commission to adopt six principles, or seven, or eight that are general and that could be adopted by Congress at the beginning of the revision of 25 U.S.C. so that there will be a clear statutory statement.

Not making new law but setting out existing law in a statutory form as we suggested yesterday with the trust relationship. It might be worthwhile for the staff to draft up a statement like that for next time which reflects existing law fairly and in a general fashion, so that the Commission could approach it in that way and then deal with the more refined parts.

Chairman ABOUREZK. Why don't you do that? I think it is a good idea.

Mr. MEEDS. Mr. Chairman, I want to at least make an argument why we should not adopt carte blanche the concept that tribes should have jurisdiction over all matters civil and criminal within reserva-

tions unless we so restrict reservations as to include only trust lands.

I am prepared to go either way on this. If you want to define reservations in such a way as to include only trust lands, then I am prepared to go huckletybuck for sovereignty and jurisdiction on those lands. I am getting back to what I said this morning. When *Worcester* and the other cases were decided and the concepts of sovereignty and jurisdiction were laid down we were talking about areas where it was just Indian land. I don't know how people feel about the allotment acts. I personally wish they had never happened. But they did happen, and we are now talking about reservations where there are non-Indians living on fee patent land who, if we include them, in this area, in reservations, and say that the sovereignty of the tribe extends to their everyday life, their taxation, their civil rights, their criminal rights, all other rights, we are saying to them that they do not have a right to have any input in the decisionmaking process under which those laws which regulate them are made.

I, personally, will vote against, and write against, any kind of recommendation which I think abrogates or continues the abrogation. I think I kind of agree with Charlie that the courts are probably already saying this continues the abrogation of the single right, which I feel is the most important right, and that is the right to vote—to have an input in the place where you live.

I don't think anyone of you would disagree with me that if you accept the concept, even the present concept on a reservation, that there are many non-Indians within reservations who do not have any input in the decisionmaking process on those basic decisions which affect their lives where they live.

Does anyone disagree with that?

Mr. WILKINSON. Congressman Meeds, as you know I very respectfully disagree and I disagree vehemently. I believe——

Mr. MEEDS. How can you be respectful and vehement all at the same time?

Mr. WILKINSON. You and I have been doing it for years and enjoying it very much.

Congressman Meeds, that proposal would gut Indian law, Indian rights, and would stamp this Commission as a Commission that did the things that were done in 1887 and were done during the 1950's. There is nothing more fundamental than the fact that Indian tribes are separate and they can establish their own governments.

What you are suggesting would, not in theory, but effectively eliminate the right of Indian tribes to mandate matters on their reservations. You can't have a comprehensive zoning program to protect the clean air on Indian reservations if you can't zone the other lands, too. You can't discriminate against non-Indians now because of the equal protection clauses in the Indian Civil Rights Act. You can't just tax them now for very substantial guarantees. But such a proposal, either alternative you mentioned, I really do deeply believe would stamp this Commission in the way that I have suggested.

It is that fundamental. It would mean taking away truly basic rights. It would mean taking away some of the most important elements of self-government.

Mr. MEEDS. But the concomitant of that, or the other side of that is for this Commission to make some recommendations which in

my estimation take away the most basic right of citizenship, and that is the right to vote.

Mr. WILKINSON. Indian law and policy——

Mr. MEEDS. We know how each other feels about this. I think you know I feel very deeply that Indians ought to be allowed to have the greatest Indianness they want. But when Indianness collides with the basic constitutional rights of American citizens, then Indianness must give way.

Mr. WILKINSON. The courts have found that those basic constitutional rights do not exist—the right to vote on an Indian reservation. You will take away Indianness. You will take away Indianness if you permit non-Indians to vote for tribal council members and to sit on tribal councils. It can't be done. We are not going to have Indianness 100 years from now if this Commission makes such a recommendation.

Mr. MEEDS. Well, there are some alternatives, and you and I have discussed this. How about commissions? Zoning, for instance. You can't comprehensively zone a reservation unless you can zone all the land, and I tend to agree with that.

How about setting up a commission for the zoning in which those non-Indians, who are going to have their land zoned, will have some input, will have a voice, will have a vote?

Mr. WILKINSON. I consider that a very different proposition. I think it is one that the Commission should consider. It tends to be a scalpel kind of proposal rather than a blunt instrument type.

Mr. MEEDS. I have always disliked blunt instruments.

Mr. WILKINSON. If this Commission wishes to set up the following kind of system to provide for specific circumstances, it might be OK. For instance, suppose a tribe wishes to tax. The tribal council would recommend a tax and establish a taxing authority. Only Indians would be in the taxing authority but perhaps non-Indians within the tax district could vote. That is something rational, a serious proposal for this Commission.

I personally don't think it is necessary. My staff colleagues don't believe it is necessary. But that is a reasonable proposal.

But what can't be done is to take away or to give non-Indians the right to vote on the reservation. We can't take away the right of tribes to tax non-Indians. There is nothing in my judgment that holds more promise and more excitement for the future of Indian affairs than the possible development of tribal tax systems. This is the way we can have self-determination.

Mr. MEEDS. I agree with you.

Mr. WILKINSON. If we take away the right to tax non-Indians, that is not going to happen. Not because the non-Indians have the money. It is not that simple.

Mr. MEEDS. Do you believe non-Indians should be taxed without having any input into it? You know we had a revolutionary war in this country over that very question, Charlie.

Mr. WILKINSON. Congressman Meeds, I could list 20 examples of situations in which people are taxed without voting. I will list a few. If you own second land somewhere in another county or another State, you don't get to vote on whether you are taxed. If you live outside the city of Boston and commute in Boston, then you get taxed on your income in Boston and you don't get to vote.

Mr. MEEDS. Where do you live?

Mr. WILKINSON. I live in Oregon.

Mr. MEEDS. Restrict it to where you live.

Mr. WILKINSON. If, and this is the most important analogy. If you choose to move to Canada, you cannot vote until you become a citizen. You do not get the right to vote. I see nothing wrong with applying that analogy to Indian reservations.

Mr. MEEDS. But people who reside on Indian reservations are citizens of the United States, and if you restrict it to citizenship—if you want to, although I don't think that is necessary—and to where you live, can you give me another example of people who are taxed without having some input at that place?

Mr. WILKINSON. It took this Congress almost two centuries to give the right to vote to the District of Columbia.

Mr. MEEDS. I understand that.

Chairman ABOUREZK. Any alien who moves into the United States can't vote but he has to pay taxes. But he chooses to live here and it is up to the U.S. Government to determine whether he becomes a citizen, just as it is up to a tribal government whether somebody becomes a citizen.

Mr. MEEDS. We are talking about citizens.

Chairman ABOUREZK. Well, if you move onto a reservation, you don't become a citizen of that reservation. You become a resident there but not a citizen.

Mr. WILKINSON. I think the best answer to that is yes; and under the law there is such a situation now on Indian reservations and I suggest you not change it.

Mr. MEEDS. OK.

Commissioner BORBRIDGE. Mr. Chairman, if I may comment? Again I would like to turn this around a little bit, because it seems to me we spent a lot of time here, over the course of some hearings, talking about the sovereignty of the Indian tribes. I think we have laid a pretty good case legally and from a historic viewpoint. And as we look at the law, at least operable on several of the principles involved, it seems to me that I want to sweat up here, and I am perfectly willing to pound the desk, too, and say what about the Indian. To me that is why we are here.

Now, out of the principle of establishing the sovereignty and examining the characteristics of that sovereignty I am perfectly willing to concede that there are going to be areas that are going to have to require some special attention, and that somehow if we run into irreconcilable principles where we are concerned about the rights of an individual who cannot participate, I say that we have to be just as equally concerned, just as strongly concerned, and for the record, just as much concerned about the Indian tribe that may be suffering a serious erosion in its right to govern. To me the right to govern means the right and opportunity to protect your resources, whether you are talking about land, or whether you are talking about resources of the land. When you start to move away from that there are actions, characteristics of sovereignty if you will, which if eroded will protect or conversely will erode the very right of the tribe to protect itself, and for that matter to even continue in an effective manner.

I suggest that there are two very basic concerns. One that Congressman Meeds has enunciated very clearly and very eloquently, and the other concern, and I don't say that it is second, I say that if there are two number ones this is the other one that I see as fully as important, because this is one that has been rooted in the basic historic policy of this country, and that is to recognize the sovereignty of the injured tribes and to try through the basis of honorable dealings to so recognize their rights, that hopefully it would act in an even more enlightened time where we are today.

When we come down to the exercise of the power of the sovereign we have every right to demand of the sovereign, and that is why we are sitting as a commission to demand that the sovereign should act according to the highest standards possible for that sovereign to attain.

To me this is not just the question of just technical rights, although it must be reduced to that. We have to be concerned about the principles that are involved here, and the principle to me is not only the rights of the individual but the rights of the tribe. I am concerned that we do not go on record as taking any position that is going to further erode any of the rights of the tribe to exercise such rights as it had as a sovereign.

I recognize that given the multitude of tribes, if I have been impressed by one thing, it is the tremendous diversity and the condition of the tribes. I see allied with that a diversity in the type characteristics of the rights that it is exercising as tied in with its sovereignty.

Some tribes are exercising much more in the way of sovereignty than are others. So I recognize this diversity. But I think it is very important we clearly establish that this is one of the basic reasons why we are here.

Mr. WHARTON. Mr. Chairman, with respect to non-Indian people in reservations and the relative rights of those people in the tribal government that they find themselves cohabiting with, those people were led there by the U.S. Government under allotment policies. They were deceived as to the jurisdiction under which they would fall. It is the responsibility of the U.S. Government then to those people, and I submit to you that it cannot be discharged by abrogating the rights of the tribal government who did not guarantee anything to those people and who were ultimately the losers under that allotment policy.

Mr. STEVENS. Mr. Chairman, related to that, I just want to point out that at our next session, particularly in the economic development, possibly in another part, we want to deal with that particular thing.

In 1934 a statute was passed to repurchase and that has fallen into disuse. I think that possibly, in many ways, a substantial way of dealing with the whole question is to institute a solid system of being able to acquire reservation lands.

On the Standing Rock Reservation just a few years ago there was 56,000 acres for sale by non-Indians which the Standing Rock people are unable to buy. These are non-Indian people who want to sell. Pine Ridge is in the same situation.

The Indian people would like to purchase that land. They are not even particularly requiring grants. They are asking to borrow money to buy it back. They are in a mood to develop it.

We think that over a period of time, and we are, I am sure, willing to go 50–100 years, but it seems to me this particular question, the ultimate way to deal with that, is in that fashion. The ultimate way is to make the commitment to let the Indians, over a period of time, even under loan systems. Later on when we get into this, is to get appropriations.

When we get into Federal administration, you will see the whole trend of the disposition of the Federal Indian budget—to me at least, if it is not delivered it is at least implicit—heading down the road towards the Federal domestic assistance programs and seeing Indian programs run in that parallel. And knowing that the United States has a primary responsibility to protect us in our land. And by not providing us the money, not only in acquisition but in defending our rights.

While I was in the Bureau we showed the Department of Interior that the Indian tribes had a substantial loss in income annually because the Bureau of Indian Affairs was unable to transact real estate business. I wrote the memorandum myself and submitted it, and yet in welfare the Indian people have an open book. Whenever it comes to education, manpower, or any other domestic assistance program that any other non-Indian person in the country has because they are a citizen, Congress has been more than generous. But when it comes into this specific area and then jumping back and finally saying again the acquisition by tribes of many of these things will solve a good many of these things.

I think a commitment by the United States or by Congress to do that will do much toward solving some of the jurisdictional problems.

Mr. MEEDS. Ernie, I don't disagree with what you are saying. In fact, I think that consolidation programs are a good way to solve many of those problems.

But I would suggest that it would be much better to start with the nearly total assertion of sovereignty over a jurisdiction which is an area which can be properly governed now and extend as you consolidate rather than starting with a great, vast area of land where there may be three times as many non-Indians as there are Indians, and trying to assert nearly total sovereignty over that area initially.

Now maybe there is a disagreement in methodology.

Mr. WILKINSON. I think right now if the Indian country statute, 18 U.S.C. 1151, is left as it is these problems simply are not going to arise. In other words, there are very, very few situations now in which Indian jurisdiction is being asserted over areas like that. Very, very few, and those will go into court under a very reasonable statute.

Mr. MEEDS. Most of them must be in my State, I believe. If there are very few, they are all in my State.

Mr. STEVENS. I think they are concentrated in the States of Washington and South Dakota.

Commissioner BRUCE. Since you are advocating that non-Indians vote on the reservation, then I assume you are suggesting that they be enrolled on the tribal rolls; right?

Mr. MEEDS. No; not necessarily at all. All I am suggesting, Lou, is that when decisions are made which affect people where they live, they should have a vote. They should have representation. They

should have input in that decisionmaking process. Of all of the rights of American citizenship I think that is the single most basic right, and I think it is being denied to people who reside on reservations through a policy which I don't agree with but which is nevertheless there.

Commissioner BRUCE. We do have some reservations where recently they have asked, within the last 2 years, for nonmembers of that specific tribe to be moved off from that reservation—Indian and non-Indian who are not members of that tribe to be moved off of the reservation and not allowed to have any participation, voting or anything else.

Mr. MEEDS. We had some programs like that in other countries, as I recall, too.

Well, now you see I would disagree finally with this. I think that is a basic violation of a right of citizenship, you see.

Chairman ABOUREZK. Well, would you agree with that so far as a democratic secular state of Palestine is concerned?

Mr. MEEDS. Moving people off or on?

Chairman ABOUREZK. Back on.

Mr. MEEDS. That is an international question.

Chairman ABOUREZK. Yes; it is.

Mr. STEVENS. Mr. Chairman, maybe we could go on to Public Law 83-280 and go back to the pits with this and come back again.

Chairman ABOUREZK. You have got 9 minutes before adjournment so take your pick. What is your pleasure?

Mr. STEVENS. We will just move to Public Law 83-280.

Chairman ABOUREZK. OK. Well, anyhow you are going to write down those principles and you are going to offer them to us next time. Right?

All right, let's go on to Public Law 83-280 then, quickly.

Mr. ALEXANDER. Our 280 proposal is a retrocession proposal similar to S. 2010, which I am sure you are familiar with.

Chairman ABOUREZK. Are you asking for action on that at this time, Paul?

Mr. ALEXANDER. Yes.

Mr. ABOUREZK. Would you quickly and briefly state what that principle is?

Mr. ALEXANDER. OK. That legislation be passed by Congress that provides for retrocession according to the following principles:

Retrocession of State jurisdiction over Indian reservations should be at tribal option with a plan that there be a flexible time period provided for either partial or total assumption of jurisdiction by the tribe. And there should be a significant preparation period and financial resources available to the tribe for the preparation period.

There should be direct financial assistance of the tribes, or tribally designated organizations. The Law Enforcement Assistance Act should be amended to allow for retrocession planning funds. I will skip quickly.

The Secretary of Interior should act within 60 days on a plan. Otherwise it would be automatically accepted. That he should date nonacceptance on an inadequate plan and delineate specific reasons for nonacceptance.

After the passage of any retrocession act the Secretary should submit regulations for a procedure to Congress which Congress would within 60 days approve or disapprove.

There is a provision for consultation with State and local governments based on the Menominee experience. There also is a provision for appeals to a district court on the judgment of the Secretary of Interior.

Basically it is an administrative procedure act type of thing.

Chairman ABOUREZK. Is there any disagreement with that basic principle?

Mr. MEEDS. Mr. Chairman, who decides when and how retrocession will take place?

Mr. ALEXANDER. That is the basis of the tribal plan. The Secretary of the Interior has the judgment about the adequacy in terms of the current resources available, the timing and this gets us really quickly back to presumptions of acting in good faith and reasonableness.

Every tribal chairman that I have spoken to, and I have spoken to a lot of them about this in tribal councils, talk about a long-time period, except for some of the larger tribes who already have operable law enforcement apparatus. The Quechans in southern Arizona talk about a 6 to 7 year step-by-step process.

Mr. MEEDS. But who determines when that process starts?

Mr. ALEXANDER. Well, the process would be established in the plan that is submitted to the Secretary of the Interior, and the Secretary of the Interior accepts for the United States. They would be in the consultation process in the development of the plan and implementation. But just as the tribes had no say when Federal jurisdiction over them was transferred to the States——

Mr. MEEDS. But they did in many instances. Jurisdiction could not be transferred without their consent.

Mr. ALEXANDER. They had in your State, and in some other situations by State law they had a say in the matter. But in most situations, at least in the mandatory States and many other States, it was completely arbitrary with respect to the tribes.

Some specific tribes, like the Warm Springs, were excluded specifically in the legislation when they testified in the Public Law 83–280 hearings before the passage of the act, that they had adequate law enforcement machinery. Other tribes specifically testified and were not excluded.

I think the point is important in relation to small tribes. This allows to part or all, it allows for timing, and it allows for a maximum flexibility. Many of the small tribes, particularly in the southern California area, have indicated a wish for a continuing relationship with county and State governments in specific areas. What will happen will be a negotiation process, as recommended.

The differences from S. 2010 have to be pointed out. One of the substantial problems in the State of Nevada where retrocession occurred 2 years ago was that no funding was provided, no preparation funding was provided from the date of the submittal by the State of Nevada of its offer to retrocede to the Secretary of the Interior. A year passed before the Secretary of the Interior accepted retrocession which occurred immediately thereafter and nothing happened.

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There was not money for a new agency. There was not money to train new police officers. It was the date of the retrocession that tribes began to get the kind of funding necessary to develop a modified consitution and so on. And the Nevada experience speaks to the needs of planning for many of the tribes before they can go to a retrocession.

Chairman ABOUREZK. What if the Secretary of the Interior has enough money for, say, two tribes to take back jurisdiction but 20 tribes apply for it? How is he going to handle that?

Mr. ALEXANDER. The Secretary's obligation would be to come to Congress for a specific authorization.

Chairman ABOUREZK. What if Congress turned him down?

Mr. ALEXANDER. Then he would have to allocate reasonably based on the plans he had before him.

Chairman ABOUREZK. In other words, he can't turn down based on the lack of money.

Mr. ALEXANDER. It gets you back almost to the assumptions that Public Law 83–280 operated on in the first place. The States were given that jurisdiction and not 1 penny. As a matter of fact, some of the retrocessions occurred for economic reasons.

Chairman ABOUREZK. Are there any other questions on that?

Mr. MEEDS. It is my understanding that the Commissioner or the Secretary is the one who approves the plan. Is that correct?

Mr. ALEXANDER. Yes; unless we would be coming into a new agency.

Mr. MEEDS. Right. Well, whoever has the authority.

Mr. ALEXANDER. Right.

Mr. MEEDS. So if we are talking about the situation he has here, if he had money for only two and had 20 before him, then presumptively he could pick the two best ones. The two that had the best chance of succeeding and approve those and not the others. Is that correct?

Mr. ALEXANDER. It is not just the Secretary of the Interior's money, first of all. We have substantial funds through LEAA which becomes available which obviates some of the start-up moneys. There are moneys that can be provided through LEAA for the drafting and training of the law enforcement officers, provisions for equipment, and so on.

The Secretary would then try to negotiate in terms of the resources that he had obtained, to Congress——

Mr. MEEDS. You are going around the barn. Get straight to the point. No, no, we are; I did; you did. The point is does the Secretary have any discretion in whether or not he approves a plan? Must he approve plans, or may he stop retrocession by failing to approve a plan?

Mr. ALEXANDER. He can only turn down retrocession with a plan that is inadequate.

Mr. MEEDS. Who decides that?

Mr. ALEXANDER. He would decide that.

Mr. MEEDS. Then he does have that.

Mr. ALEXANDER. Also Congress has that. But it has to be specified by criteria that would be submitted to Congress.

Chairman ABOUREZK. And the term inadequate would be subject to court interpretation.

Mr. ALEXANDER. Right.

Commissioner DEER. Where does the Department of Justice fit in here? As you know under recent experience we had the approval of the Department of the Interior but when we got to Justice we had a problem.

Mr. ALEXANDER. Yes; the Department of Justice would not fit in this pattern, because it would be the Department of the Interior's judgment. I am not even quite sure why the Department of the Interior consulted with Justice in that Menominee situation. It is at the Secretary's discretion.

Commissioner DEER. I think that should be resolved then to prevent any further future problems.

Chairman ABOUREZK. If there are no other questions on this, go ahead and adopt it and bring it back in whatever specific language you want.

Mr. ALEXANDER. There is no opposition to it?

Mr. MEEDS. I have some opposition.

Chairman ABOUREZK. There is scattered opposition.

Mr. WILKINSON. Mr. Chairman, may I raise a very brief matter? I hope I am not being out of place in mentioning this, but I just feel I should. I am not saying this as a member of staff but as someone who has been on the west coast and not back here.

I believe that the present schedule the Commission has is a problem. If you are planning seriously to mark up this final report on the 3d, 4th, and 5th as the schedule indicates, I frankly don't think you can do it. Not because of staff work but because this has to be reworked, the part we have discussed now, including some textual sections where you really should go over line by line. Plus you have major work ahead of you on the first review that you are doing now.

I would just throw out to you that at least in my judgment what you may have to do is to hold your hearing on the 3d, 4th, and 5th for the rest of the report in the depth we are doing it now and get back a final draft for a meeting on February 17 or 18. I just think that if you don't do that you are not going to have a work product that you are really happy with.

Chairman ABOUREZK. We will do it.

Mr. MEEDS. And would still retain the end goal of a 3-month extension?

Chairman ABOUREZK. Yes.

Mr. MEEDS. Do you think we can handle that all right, or should we maybe extend it 4 or 5 months?

Chairman ABOUREZK. I don't think so. I think what we are going to do, next time around, we are going to meet the 3d, 4th, and 5th. But we are also, later on in February, going to meet on a weekend and a couple of weekdays.

Commissioner DIAL. Mr. Chairman, let's make it the 18th and 19th, a Friday and Saturday.

Chairman ABOUREZK. Friday and Saturday. OK. We may even have to shift that even beyond that a day or two, because I am not sure when the Lincoln Day recess ends. We will have to meet after that is over with, because I think the Congressmen and Senators have scheduled themselves during that recess out of town.

So the next meeting then will be February 3, 4, and 5, and the meeting is now adjourned until that time.

[Whereupon, at 3:20 p.m., the meeting was adjourned.]

MEETINGS OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION

FRIDAY, FEBRUARY 4, 1977

AMERICAN INDIAN POLICY REVIEW COMMISSION,
Washington, D.C.

The Commission met, pursuant to notice, at 10:15 a.m., in room 1324, Longworth House Office Building, Congressman Lloyd Meeds (vice chairman of the Commission) presiding.

Present: Senator James Abourezk, chairman; Commissioners Adolph L. Dial, John Borbridge, Jake Whitecrow, Ada Deer, Louis R. Bruce; and Congressmen Lloyd Meeds, and Sidney R. Yates.

Staff present: Ernest L. Stevens, staff director; Paul Alexander; Peter Taylor; Patricia Zell; Donald Wharton; Gilbert Hall; Max Richtman; Frank Ducheneaux; and Fred Martone.

Mr. MEEDS. The American Indian Policy Review Commission will be in session. The agenda is before us.

The first matters that we will be dealing with are those regarding the amendment to the legislation, which is necessary to continue the study.

Would you like to report to us, Ernie, on what is essential and what will be necessary for us to do?

Mr. STEVENS. I would like to have Max Richtman handle it. He has handled the amendment and the budget related to it.

Mr. MEEDS. Very well.

Mr. RICHTMAN. As the report indicates, Senator Abourezk introduced the joint resolution amending our authorizing legislation on January 14.

It passed the Senate yesterday, and I talked with Frank Ducheneaux, and it will go to the House probably on Monday or Tuesday, and he said he would take it up with the vice chairman of this Commission, to try to take it to the floor as soon as possible, and have it pass the House.

That should not take more than a week or two, I would think.

Mr. MEEDS. I hope not, if we can bring it directly to the floor by unanimous consent and extend it that way, I think that is what we should try to do if we can.

Mr. RICHTMAN. That is what Frank indicated, too.

Mr. MEEDS. Otherwise we will have to get it out of the committee, which means that it will not be out until after the recess.

Mr. RICHTMAN. We have also been talking to the staff people in the Senate and House Legislative Appropriations Subcommittee, to help prepare our budget justification for the additional appropriation that corresponds to the increased authorization of $100,000.

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We will be appearing as soon as the new amendment is signed into law. We will appear before the Senate and House Subcommittees on the Legislative Appropriations, to make our requests.

I think that is all that is relevant on that point.

Mr. MEEDS. I assume it would be necessary for us to approve the budget. Do you have it?

Mr. RICHTMAN. The budget is attached to the report.

Mr. MEEDS. Did you want to explain it to us just a little, Max?

Mr. RICHTMAN. Surely. The front page is a summary of all of the budget figures that are included in the following three pages.

The totals, as you can see, for the first section, are for salaries and wages. For Indian Commissioners, we have budgeted 40 days each for the period October 1 through June 30.

That seems to be adequate, based on the number of days the Indian Commissioners have been working for the Commission since October 1.

We think that is an adequate amount. The other budget figures for the staff that was appointed by the Commission, for the professional staff, staff consultants, and clerical support have been increased to these figures from previous budgets, based on the directives by the Commission that the staff distribute copies of the first draft of the final report, and have staff on hand when those comments come in to incorporate them into the final report.

We have extended the terms of appointment for some of the staff people, in order to keep them here to do that work.

That is the reason these amounts are what they appear to be here. On page 2, administrative expenses, we have detailed the number of days of travel in terms of per diem and air fare that will be required for the Indian Commissioners to attend meetings as they are scheduled at this point.

These markup meetings that we have been having and our final meetings in April and May expenses are $6,500. Those are solely the costs of transcripts, and those are based on previous experience for cost of these Commission meetings.

On page 3, office supplies, telephone communications and printing and reproduction are all figures based on the last year and a half experience in operating the Commission.

They are proportional to previous months, and I think they will get us through this period.

Mr. MEEDS. Any questions by members of the Commission regarding the budget?

Commissioner BORBRIDGE. Mr. Chairman?

Mr. MEEDS. Mr. Borbridge.

Commissioner BORBRIDGE. Obviously, as we discuss the budget, it is in light of the fact of previous discussions in which staff indicated that the amount proposed to be added to the original budget would be sufficient to meet the needs of the staff as they, in turn, met the requirements imposed by the Commission.

Is staff still of the opinion that this amount is adequate? I pose this not because we can, obviously, change it. But rather if there are any difficulties of any kind, at least I would like to be aware of them.

Do you still feel this is entirely adequate?

Mr. RICHTMAN. I feel this is entirely adequate; yes.

Mr. MEEDS. For the record, the additional money here is simply for the purpose of the 3-month extension, and the fact that this report is now to be mailed out, comments received back, and additional drafting and work done thereafter to prepare a final report.

That is to say, had it not been for the Commission request for a 3-month extension to publicize this and get comments, this $100,000 would not be there at all.

Mr. RICHTMAN. That is correct.

Mr. MEEDS. And you would have been able to finish within the budgeted amount that we originally set?

Mr. RICHTMAN. That is correct.

Mr. MEEDS. Is there objection to the adoption of the budget? If not, without objection the budget is adopted.

You covered C on the agenda also?

Mr. RICHTMAN. We have covered B and C in a previous discussion.

Mr. MEEDS. We are now on administrative matters. Would you like to report on that, please?

Mr. RICHTMAN. As the report states: We have received in printed form and distributed 1,000 copies of committee prints of all the task force reports, except task force 2, tribal government; task force 5, education; and task force 9, legal codification and consolidation.

Those three reports are either in galley stage or page-proof stage right now, and should be delivered in our office as printed and bound within the next 10 days to 2 weeks.

As soon as they come in, they will be distributed, the mailing lists have already been prepared for those reports as they were for the other reports.

Mr. MEEDS. Which ones were those again, Max?

Mr. RICHTMAN. Task force 2, tribal government; task force 5, education; and task force 9, legal codification and consolidation.

The delays with those reports are largely mechanical. There were difficulties with some of the charts in task force 5, and they had to be reproduced and sent back to the task force members, because they were not legible.

Task force 9 is such a massive report that it has taken a long time for them to type-set it and task force 2 went through a lot of editing stages.

Mr. MEEDS. It is your intention, is it not, to initially produce 1,000 copies of each of the task force reports?

Mr. RICHTMAN. We have already distributed 1,000 copies of all of the other task force reports.

Mr. MEEDS. All of the others?

Mr. RICHTMAN. Yes; and we will be receiving 1,000 copies of these three for distribution.

Mr. MEEDS. In printed form?

Mr. RICHTMAN. In printed form.

Mr. MEEDS. Did the Commissioners get any?

Mr. RICHTMAN. Yes.

Mr. MEEDS. I don't recall getting any.

Commissioner DIAL. I didn't get any. Only those I picked up the day before yesterday. We have not received any in the mail.

Mr. RICHTMAN. We will bring them up here this afternoon, then.

Commissioner BORBRIDGE. Mr. Chairman, with respect to those mailed to the Commissioners: how many copies of the report are staff preparing to send to the Commissioners?

Mr. RICHTMAN. We have not made any determinations on that. We have enough copies available for whatever the Commissioners desire.

Commissioner BORBRIDGE. Fine. Thank you.

Mr. MEEDS. Let me just ask this: Have any of the Commissioners received the Government Printing Office prepared reports that you are talking about?

Commissioner DEER. I have.

Commissioner WHITECROW. Those that I picked up the last time we were here.

Commissioner DIAL. I picked them up in the office last Wednesday.

Mr. YATES. They look like Senate documents; don't they?

Mr. RICHTMAN. Yes.

Mr. YATES. We have them.

Mr. MEEDS. Have you received them?

Mr. YATES. Yes; I am sure they are in our office.

Mr. RICHTMAN. I am sure they have been taken to you, Mr. Meeds, but I will check.

Mr. YATES. Who received the 1,000 copies, Mr. Chairman?

Mr. MEEDS. I assume the staff did.

Mr. YATES. Why did we need 1,000 copies?

Mr. RICHTMAN. The standard amount the Government Printing Office runs is 1,000 copies. They also print 1,000 copies that are for sale to the public.

Prices range from $1.25 to about $2.50, depending on the size of the report.

Mr. YATES. Are these autographed copies? [Laughter.]

Mr. RICHTMAN. Not that I know of.

Mr. MEEDS. You will make sure that Commission members receive copies of all the task force reports and as many other copies as they might desire to distribute to people.

Mr. RICHTMAN. Yes.

Commissioner DEER. Mr. Chairman?

Mr. MEEDS. Yes.

Commissioner DEER. What happens if there is a great demand by the public? Will the Government Printing Office reprint these? Does there have to be a certain amount of requests——

Mr. MEEDS. I will answer. It would take a resolution, in either the House or the Senate, one or the other.

Mr. RICHTMAN. It would probably, for this Commission, take a concurrent resolution to print additional copies in addition to the ones that are for sale. They are for sale by the Government Printing Office. Anybody can purchase them. If they run out of the 1,000 that they have printed for sale, they will print an additional 1,000.

The ones that are for sale would not require a resolution.

Commissioner DEER. I don't mean necessarily giving them away. But there will be thousands of requests——

Mr. MEEDS. There probably will be. Then we will consider a concurrent resolution to print more, or if they are being paid for, they will pay for themselves, one or the other.

Good morning, Mr. Chairman.

Chairman ABOUREZK. Good morning.

Mr. RICHTMAN. The final item in the staff report deals with the printing of the final report. We have been discussing and negotiating with the staff people on the Joint Committee on Printing and the Government Printing Office to determine what kind of format we would like this report to be prepared in.

The standard committee print would not require any additional efforts on our part. We have been looking at this volume of the Public Land Law Review Commission's report, and have been considering adapting our report to this kind of style and this kind of format, which would include color illustrations——

Commissioner BORBRIDGE. Of what?

Mr. RICHTMAN. Of health facilities on reservations, educational facilities, graphic displays, and charts. Graphics and photographs is the deviation that is involved, and the format that we would like the report to be prepared and printed in.

That also would require a concurrent resolution, if we decide to do that.

Mr. MEEDS. Would it require that if you did not have color?

Mr. RICHTMAN. If we have photographs in the report and have the size of the report 8 by 11, which I think this is, that would require a concurrent resolution.

Additional costs would not come out of the Commission's appropriation, but it would require another resolution.

Chairman ABOUREZK. What is the difference in cost, Max, between the regular black and white?

Mr. RICHTMAN. We don't know that yet. In order for this to be introduced into the Senate we have to have backup material as to the estimate of the cost.

We have told the Government Printing Office what we are thinking of doing. They are preparing an estimate right now as to what the cost would be.

That is necessary, before we can go any further.

And we should have that next week.

Chairman ABOUREZK. I don't know. What do you think, offhand, about putting color photographs in?

Commissioner WHITECROW. Mr. Chairman, I think at the start of our Commission hearings we began talking about what the report should look like.

It should be a very readable document, and with a little color added to the document I think we could get more people to actually sit down and take the time to read it.

I would encourage, if at all possible, to make it as colorful a presentation as we can.

Mr. MEEDS. Mr. Chairman, I don't think we can make a decision on that today. I think what we really need to have is more facts as to the additional cost, as to how much would be required in a concurrent resolution, things like that, before we can decide on it.

I think we ought to authorize the staff to continue looking into it, so that they can prepare this kind of information for us next time.

Mr. RICHTMAN. We will provide that information at the next meeting at the end of this month. We should have all that information in our hands at that point.

Chairman ABOUREZK. I don't think we need take any formal action on that. Now you are ready to go into the material; is that it?

Mr. RICHTMAN. Yes, sir.

Chairman ABOUREZK. I want to announce that the Senate has passed that resolution extending the time for submitting the report, and authorizing an additional $100,000.

Are you able to give us an idea—it has to be done before February 18, because that is the date for submission of the report.

If we don't extend it legally, we are in violation of the law.

Mr. MEEDS. I suggest we ought to try to take it from the Speaker's table and bring it up by unanimous consent.

Mr. YATES. Has it been filed yet?

Mr. RICHTMAN. It will probably be filed on Monday.

Mr. MEEDS. I assume it will be on the Speaker's table by either Monday or Tuesday. We could seek unanimous consent to take it from the Speaker's table.

We will have to talk with some of our colleagues before we do this.

Mr. YATES. Are there some who are opposed to it?

Mr. MEEDS. There will automatically be some people who are opposed to it. I think if we talk to them—there is ample rationale for doing this.

Total expenses are brought on solely from the fact that we are extending this 2 months for the purpose of circulating it and getting comments.

I think it is a good step and most people who might be prone to object will agree on that basis. Mr. Yates and I can undertake to talk to some people and see if we can bring it on by unanimous consent on Monday or Tuesday.

Mr. YATES. You are still on the Interior Committee, too?

Mr. MEEDS. I am.

Chairman ABOUREZK. There has also been a little leadtime, so that President Carter can sign it once it is passed.

Mr. YATES. Why can't it be brought up Monday or Tuesday?

Mr. MEEDS. If we can bring it up Monday or Tuesday it will be all right. Otherwise, we will be in trouble.

Mr. YATES. Why can't we get a copy of what you passed in the Senate and present it to the House?

Chairman ABOUREZK. Yes. It has been sent over, so I assume that is what will happen.

Mr. YATES. OK.

Chairman ABOUREZK. I have a draft introduction I will pass out. Why don't you read these and pass them around as you are reading them?

Are you ready to go with demographics, chapter 3?

Mr. STEVENS. Yes, sir. I would like to quickly review what is going to come up, and then have the staff take over.

Before you do that, sir, it is going to have some bearing on our drafting, so I wanted to depart from this for a moment, and ask if the chairman would tell us the status of the committee structure in the Senate and the House.

The reason for that is that we have a specific——

Chairman ABOUREZK. Have the chairman tell you what, Ernie?

Mr. STEVENS. The status of the committee structure in the Senate and the House. The reason for that is that we have a specific recommendation which the staff, not this time but at the next meeting, will have a recommendation relating to the committee structure in the Senate and the House.

You have a position here, and it would just be good information to know the status of it.

Chairman ABOUREZK. What has been done so far on the Senate Indian Committee: Today, sometime, the Senate will pass a rule that will be final, establishing a full Indian Affairs Committee for a period of 2 years, that would terminate at the end of this Congress.

After which time the Indian affairs jurisdiction of all sorts would go into the Human Resources Committee as a subcommittee.

Right now, the Indian Committee handles all Indian affairs jurisdiction, with one exception, and that is the Alaska Native Claims Settlement Act, which Chairman Jackson wanted to keep in Interior, pertaining to the act itself.

I have no real objection to it, so there is probably not much I could have done about it anyhow. So we will let that go.

We have jurisdiction over all other Alaskan Native affairs, as well as all Indian affairs, outside of the land portion of the act.

I don't know what has been done in the House. I will have to let Sid and Lloyd speak on that.

Mr. MEEDS. Mr. Chairman, perhaps I can speak to that. We have not fared nearly as well, as I think most people in this room know. Indeed, we have gone backward, which is not unusual.

Mr. MEEDS. Following our traditional custom.

Chairman ABOUREZK. Yes.

Mr. MEEDS. The Subcommittee on Indian Affairs of the Interior Committee is now combined with the Public Lands Subcommittee and obviously is not going to be the kind of focal point that it was.

The chances of getting any kind of ad hoc or special or select committee appointed by the Speaker, I would think, would be very slim.

Although the fact that you have established a select committee in the Senate would probably help in that regard. I am certainly willing to approach the Speaker about this. I don't know about the gentleman from Illinois.

Perhaps he will join me.

Mr. YATES. I am sorry—I was reading this statement. What was the point?

Mr. MEEDS. Whether we should have some kind of an ad hoc or select committee in the House on Indian affairs, as they have in the Senate.

I think the chances of doing that are very poor. I don't think Udall would complain about it.

Mr. YATES. I think that was under consideration at the time that they merged with the Public Lands Subcommittee, and they decided not to do it.

Mr. MEEDS. I don't think the impetus for this will come from Udall.

Mr. YATES. What is lost, really, by having this merger? Do we have any indication that Indian affairs and problems will not be given adequate consideration?

Just the fact of the merger is a retreat; is that your point?

Mr. MEEDS. Even that is a retreat, but it is also rather clear, and I am not casting any aspersions on Mr. Roncalio at all, but it is also clear that there are many things before the Public Lands Subcommittee just by itself.

To put Indians in with that, an otherwise busy subcommittee, is, I think, going to be a loss of visibility for them. That is my personal opinion.

I see Mr. Ducheneaux is here, and I think he would concur with me in that. Is that your view, Frank?

Mr. DUCHENEAUX. Yes, sir.

Commissioner BORBRIDGE. Mr. Chairman, I very much concur. This is exactly what is happening.

As I understand it, something of a holding pattern is intended for Indian matters, in the light of public land issues and other matters having a high priority.

It is my view that the merger of Indian interests with others is having that type of an impact.

Chairman ABOUREZK. I think it might not be a bad idea if this Commission were to pass a resolution right now, memorializing the Speaker to emulate the Senate in a 2-year special ad hoc full Indian Committee, with jurisdiction either left in the air or transferred to some other committee at the end of 2 years.

The point being that President Carter is going to reorganize the Federal Government. Secretary of Interior Andrus has spoken publicly in favor of a separate Indian Department.

If that Indian Department is created, then it makes more sense to continue the Select Committee on Indian Affairs.

Mr. YATES. An Indian Department in the Cabinet?

Chairman ABOUREZK. Either Cabinet or sub-Cabinet, but a totally separate Indian Department, outside of Interior. He agrees with the fact that there are conflicts.

Mr. YATES. I saw him yesterday for a brief moment, and he said he is waiting for the recommendation of this Commission.

Chairman ABOUREZK. Well, that is probably what we are going to recommend.

Mr. MEEDS. Mr. Chairman, let me say that I will certainly support that kind of resolution. I firmly believe there are some critical decisions that Congress—I might not agree with you on where those decisions should go.

But I firmly believe there are some critical decisions that have to be made by the Congress with regard to American Indian policy in the next few years, and failing that, we are going to have one hell of a mess on our hands, if I can use that terminology.

I think it would take a select committee to do that, and to do it properly. I would join in a resolution to the Speaker.

I would be happy to approach the Speaker about that. I am not all that confident that we are going to be able to achieve it. But I would certainly work for it and support it.

Chairman ABOUREZK. Let me give you some language and let's just vote on the language. I think the staff can work out the whereas clauses, but "Be it resolved that each House of the Congress of the United States establish a separate committee on Indian affairs."

Mr. YATES. You want an ad hoc committee?

Mr. MEEDS. Why don't you say ad hoc or select?

Chairman ABOUREZK. An ad hoc separate Committee on Indian Affairs, to last through the 95th Congress.

Mr. YATES. I would put a preamble in there, in line with what Lloyd said a few moments ago, about the fact that we will be considering very important matters relating to the Indian community within the next year or two.

And it is necessary that it receive the attention of the Congress.

Chairman ABOUREZK. That can be a "whereas". The Maine Penobscot and Passamaquody case will take a major part of the committee time.

Mr. YATES. Is that coming up before you?

Chairman ABOUREZK. Oh, yes, absolutely. I will have hearings within a month or so on the initial steps that need to be taken in that case.

That is a very complex thing. People can't get mortgages, municipalities can't bond their cities——

Mr. YATES. I know. The fact that it is so pending at the present time, so immediate, should be brought out in the preamble or in the whereases of the resolution, so that the Speaker is moved to do something.

Chairman ABOUREZK. Right. Put in the preamble that "Whereas we have the recommendations of the Commission itself" that we have the regular day-to-day Indian legislation that will be coming up outside the Commission report, the Maine case, what else were you talking about, Ernie?

Mr. MEEDS. Why don't you talk about the Massachusetts case?

Chairman ABOUREZK. And the Massachusetts case, yes, that is very important.

Mr. MEEDS. That will grab the Speaker. He has already talked to me about it.

Chairman ABOUREZK. Just tell him that if he doesn't want the Indian Committee to handle it, he can handle it.

Mr. YATES. Off the record.

[Discussion off the record.]

Chairman ABOUREZK. Put in the "whereas" clause that President Carter is planning on reorganizing the Government with a thought toward a separate Indian Bureau, outside the Department of Interior.

Mr. MEEDS. Just a minute, Mr. Chairman. Do we know that President Carter is considering that?

Chairman ABOUREZK. Yes; Andrus said he is.

Mr. MEEDS. Why don't we say "The Secretary" then, rather than President Carter?

Mr. YATES. There is under consideration in the executive branch——

Chairman ABOUREZK. Yes.

Commissioner DEER. Mr. Chairman, what kind of a committee is it in the Senate? Is it called an ad hoc committee?

Chairman ABOUREZK. It is an ad hoc committee, but it is the Select Committee on Indian Affairs, as the title.

Mr. YATES. It will be called the Abourezk committee, no question about it.

Commissioner DEER. The reason I was asking is: Should we consider the same name in the House as in the Senate?

Chairman ABOUREZK. Well, yes. I don't think we have to put that in the resolution, but I think it is a good idea.

Commissioner WHITECROW. We can't call it the Abourezk committee in the House, can we?

Chairman ABOUREZK. You will have difficulty calling it that in the Senate, for that matter. All right. So you know what the resolution is going to be, that a special ad hoc committee for the term of this Congress be established.

Mr. YATES. Let's think about it. This is a memorial from us. All you are going to file is the extension resolution, and then——

Mr. MEEDS. Then we will talk to the Speaker about the other.

Mr. YATES. Someone will have to file a resolution, and I think we have to think about who we want to file that resolution, because he is probably going to be chairman of that ad hoc committee.

Chairman ABOUREZK. The Speaker ought to file it, if he agrees with it.

Mr. YATES. The Speaker doesn't file a resolution.

Mr. MEEDS. We will try to work that out.

Mr. YATES. I think that is very important.

Chairman ABOUREZK. We can get this done. We can memorialize the Speaker. All in favor of this resolution, pending the wording to be drafted by the staff——

Commissioner WHITECROW. A question, sir. The jurisdiction would be the same as the Senate committee?

Chairman ABOUREZK. I think all Indian affairs, I think you ought to try for that.

Mr. MEEDS. Mr. Chairman, let me suggest that we may have to make some changes in that in the House with regard to the Alaskan Native Claims Settlement Act. Frank, can you come up just a minute? As I recall in that jurisdictional hassle that we had in the House in the Interior Committee—jurisdiction for Alaskan Native Claims Settlement Act—different from what you did in the Senate, went to a continuing jurisdiction over all the Alaskan Native Claims Act.

It went to a special subcommittee; did it not?

Mr. DUCHENEAUX. It did in the House; yes.

Commissioner BORBRIDGE. I'm sorry. I did not hear the response.

Mr. DUCHENEAUX. Mr. Chairman, in the House, the subcommittee has jurisdiction over general oversight over Alaskan lands, which does not include all of the act, but the land portion of the act.

Mr. MEEDS. Maybe, then, it is like the Senate——

Mr. DUCHENEAUX. I think that is what they are trying to accomplish in the Senate.

Chairman ABOUREZK. You can use the Senate language if you want to copy that down.

Mr. YATES. On the ad hoc?

Chairman ABOUREZK. Yes.

Mr. DUCHENEAUX. Mr. Chairman, may I make another point?

Chairman ABOUREZK. Yes.

Mr. DUCHENEAUX. The jurisdiction over Indian education legislation was transferred to the Education and Labor Committee.

Chairman ABOUREZK. It should be put in the full Indian Committee here.

Mr. MEEDS. First of all, I doubt that they will create the committee. And, second, if you load it down and start fighting with the Education and Labor Committee, you are just enhancing your chances of being beaten.

Chairman ABOUREZK. If you don't have education jurisdiction, forget it. That is a major part of it.

Mr. MEEDS. We have not had it over here for 2 years.

Mr. YATES. It has been in the Education and Labor Committee.

Chairman ABOUREZK. I don't presume to tell you guys how to argue your case, but you are arguing with me that it is all in one committee over in the Senate, why fractionate it over here?

Mr. YATES. If we use that argument, they will say, "That is what is wrong with the Senate."

Chairman ABOUREZK. Well, anyhow——

Mr. YATES. You have made your suggestion, Mr. Chairman.

Chairman ABOUREZK. All in favor of this resolution say aye.

[Chorus of ayes.]

Chairman ABOUREZK. Those opposed?

[No response.]

Chairman ABOUREZK. The resolution is agreed to, and the staff will draft it and circulate a copy by tomorrow morning to members of the Commission for any corrections in language.

That will be transmitted by formal letter to Speaker Tip O'Neill on Monday, Ernie.

Mr. STEVENS. I am going to.

On these materials for review, Paul is going to be in charge of that, so I will defer to him. I would just like to emphasize one point, and that is, you will notice the repetition and the way the thing comes out, chapter by chapter, is caused by the fact that different personnel are writing different chapters.

What we want to do, after we get the findings and recommendations approved by the Commission, then we will go back and do the total, and we will strike the repetition.

We have two editors. One of them is D'Arcy McNickle, whom we have retained for 30 man-days, and he said he will do that, and then another editor and possibly a third will take care of the readability of it.

I also would suggest, Mr. Chairman, that the sections related to the work of Charlie Wilkinson, which deals with concepts, and even the introduction and the prolog, you might possibly consider deferring until that time, because I think you have to catch the whole tone, really.

That is why we have not asked to take up things like the introduction, prolog, and Charlie's part at this time.

Commissioner BORBRIDGE. Excuse me, Mr. Chairman. I wonder if I might ask for a clarification. The Commission took the position, which it is now reiterating, that Indian matters ought to be dealt with in one committee in both the House and hopefully in the Senate and House as well.

We now have a circumstance in which there seems to be some fractionation occurring with respect to jurisdiction. We also have a similar occurrence with respect to Alaskan Native Claims Settlement Act matters.

It would be most helpful, and I would like to ask if the chairman might request of the staff that we now have a written report.

The report would advise us of the various steps that have been taken with respect to the disposition of Indian matters in each house, and we should have that before leaving the meeting tomorrow afternoon.

Chairman ABOUREZK. What do you mean by "that"?

Commissioner BORBRIDGE. I mean this, Mr. Chairman. We have just been advised that Education and Labor will have jurisdiction in the House over Indian education matters.

We have just been advised that Alaska Native Claims Settlement matters are going to be retained by Energy and Natural Resources in the Senate.

On the other hand, we are not exactly sure, does this pertain solely to jurisdiction over matters pertaining to the disposition of or conveyances of land as far as Alaska Natives and the public are concerned?

Or does it extend further?

Chairman ABOUREZK. No; that is all. In the Senate, only the actual land transfers themselves will remain in the Interior Committee.

Everything, Health, Education and Welfare, Alaskans and all Indians will be in the Indian Committee.

Commissioner BORBRIDGE. Will the Indian Committee in the Senate retain jurisdiction over any matters referring to the Alaska Claims Settlement Act implementation other than land conveyances?

Chairman ABOUREZK. Yes; it has jurisdiction over everything except land conveyances.

Mr. MEEDS. I don't know what the rationale in the Senate was, but the rationale in the House for the distribution of this jurisdiction to another subcommittee was the D–2 lands matter, which the gentleman from Alaska obviously has a substantial interest in.

But other than dealing with the D–2 matter, the indication from Mr. Ducheneaux was that that was the jurisdiction that went there.

The other, therefore, would be retained by the Indian Affairs Subcommittee, which is in the Public Lands Subcommittee, which also has a piece of the action of D–2 lands.

Between the two committees, the Seiberling committee and the Roncalio committee, all of that jurisdiction will be kept. With regard to Indian education: Indian education has been in the Education and Labor Committee since 1973, when the Hansen committee report was filed.

Part of the Bolling committee recommendations which were adopted by the Hansen committee and adopted by the House in 1973, I think, so they have had that jurisdiction.

Commissioner BORBRIDGE. What I have in mind, Mr. Chairman, at this point we have an understanding of what is involved and we realize this is going to be a rather emerging and developing matter. Obviously, there will be questions of whether or not a specific subject benefits in one committee or another.

I think it would be helpful to have the staff do two things. Again, I would request that they give us a report of the current developments, which we have pretty well discussed.

These are matters on which I will be queried on my return to Alaska, and as I speak to other Indian groups. The other thing I

would like to request is that the staff keeps us apprised of developments in changes in jurisdiction as they may occur, with respect to the Indian Committees in each of the houses.

Chairman ABOUREZK. We can do that. Now, about your other question: Is that adequately answered now?

Commissioner BORBRIDGE. Yes, as I understand, Mr. Chairman, Energy and Natural Resources is interested primarily in having jurisdiction over those matters pertaining to land conveyances of natives and the public, and largely pertains to D–2, but not with respect to other matters, even though they relate to the Native Claims Settlement Act.

But they are matters of general Indian jurisdiction. Those will be handled by the Select Committee.

Chairman ABOUREZK. That is true. That is my understanding of it.

Commissioner BORBRIDGE. Thank you, Mr. Chairman.

Chairman ABOUREZK. Who is going to lead off on demographic information?

Mr. ALEXANDER. I guess I am.

Mr. MEEDS. Mr. Chairman, may I have just a moment before we commence. I would like to take this opportunity to introduce to the committee Mr. Fred Martone, who is sitting with the staff and is on retainer by this committee, under contract to work with the staff. He is a lawyer from Phoenix, Ariz., practicing privately here, under contract, working with the committee for a period of time.

He is a graduate of Notre Dame Law School (J.D.) and the master's (LL.M.) program at Harvard Law School, and is the author of an article in the Notre Dame Lawyer, and was one of the top members of his class.

Chairman ABOUREZK. What was the article about.

Mr. MEEDS. About sovereignty, jurisdiction, State versus Indian rights.

Chairman ABOUREZK. May I ask Mr. Martone how he came down on the question?

Mr. MEEDS. Which part of it, Mr. Chairman. You can read it for yourself. Well, I think that it is no secret here that I have felt for some time that you were listening to one side of the law suit, and I say that without in any way attempting to demean our staff because I think they have done an excellent job. They are quite capable people, but so are lawyers presenting one side of a law suit.

Mr. Martone's views represent another side of that case. He is here at my request to help give us a balanced——

Commissioner BORBRIDGE. Mr. Chairman, I appreciate the logic behind the presentation that will be made and the necessity of having a broad overview by the Commission on all aspects on each of the questions that come before us.

At some time I would be interested in hearing about how the mechanics of—I'm not sure whether that report is a separate report or whether a minority report——

Chairman ABOUREZK. Minority views.

Commissioner BORBRIDGE. Would it be a separate document—I'm not sure what would happen——

Chairman ABOUREZK. Usually in any committee report in Congress, whatever the majority of the committee adopts becomes the

report of that committee. That is sent out as a commission report would be.

At the end of that is placed whatever minority views any member of the committee or commission might wish to express, which represents the other side of the question. They are labeled as such, as minority or dissenting views, or whatever you want to call them.

Commissioner DIAL. Mr. Chairman.

Chairman ABOUREZK. Yes.

Commissioner DIAL. Then I take it that Mr. Martone plans to represent Congressman Meeds' ideas—to give a minority report, and this is done legally from the standpoint of a power that is given to the Congress, and such rules do not exist for other Commission members.

In other words, if I desire to bring someone in to give a minority report on nonfederally recognized tribes, say, would I have such a privilege to bring in someone under contract at *x* number of dollars? And who would decide the fee for bringing in this individual?

Chairman ABOUREZK. In response to that, Adolph, Mr. Martone was brought in at the request of Mr. Meeds.

Commissioner DIAL. I understand that.

Chairman ABOUREZK. It has become obvious at the many meetings that perhaps the majority of the Commission attending the meetings has developed a consensus view on sovereignty and various things, pertaining to this report.

At the same time it has become obvious that Congressman Meeds has developed a line of disagreement with that, which is all part of this minidemocracy we are running here.

So, when Mr. Meeds asked if he could bring on a staff person to help develop minority views in terms of his disagreement, I agreed to it. I think I have the power as chairman to do that, within limits, to hire staff.

Now, to get to your question, if you have minority views you wish to develop, I think it would be unfair to you to deprive you of a staff person.

Commissioner DIAL. I do not question the authority——

Mr. YATES. I think I would like one too.

Commissioner DIAL. I do not question his authority, the only question I ask, and I am looking forward to the gentleman's views, the only question I ask: Would someone else, Indian members in other words, have the same privilege?

Chairman ABOUREZK. The Indian members and non-Indian members on this Commission, with the exception of the chairman, are all equal.

Mr. YATES. The chairman is more equal.

Mr. MEEDS. Just like any other Commission I have ever been on. [Laughter.]

Chairman ABOUREZK. Seriously, Adolph, if you want to express minority views on that issue, and I understand your extremely strong interest in it, I think you are entitled to do it.

Now, another question, the reason we had to bring Mr. Martone on at whatever rate we are paying him, and I understand he is a tough negotiator when it comes to salaries or contract fees or whatever, the reason we had to do it that way is that there is no existing member of the staff who would be able to write a report for Lloyd Meeds according to his views.

Am I correct, because I don't agree with Lloyd.

Mr. MEEDS. Indeed that staff out there is so good that they could write for me most anything I wanted written. But it would not be anything that they felt very strongly or any heartfelt sympathy. I would not want to ask anyone to be in that position.

Chairman ABOUREZK. That is true. I am sure that they could sit down and write something, but their hearts would not be in it.

Now, the question is, for your minority views, if they are indeed going to be minority views, is there a member of the existing staff who could do that work for you without bringing somebody else in?

Mr. YATES. We don't know yet if he has minority views or majority views, but maybe we agree with him.

Chairman ABOUREZK. I don't know, maybe we ought to bring that question up very soon, incidentally.

Commissioner DIAL. That was just a point of information, Mr. Chairman.

Mr. YATES. You can have anything you want, Adolph.

Commissioner DIAL. Thank you, I don't want very much, that is why I usually get what I want.

Mr. Chairman, I would like to know the salary we are paying Mr. Martone.

Chairman ABOUREZK. I don't know, we will have to ask Mr. Martone, I guess.

Mr. RICHTMAN. We have prepared a contract which is ready for the signature of the chairman and the ranking minority member of this Commission, Senator Hatfield, and Mr. Martone. It is a sum not to exceed $25,000. That was negotiated with Mr. Martone and the sum we arrived at was less than that.

After talking to the chief counsel of the Senate Rules Committee we decided to make it $25,000 in order not to have to go before the Rules Committee again in late April or May to request an amendment if it should be slightly above Mr. Martone's estimate, which was $21,290.

That is based on a fee of $60 an hour, which is paid to the contractor, which is the law firm, estimate of 320 hours plus two or three trips to Washington, and the expenses involved in those trips.

Chairman ABOUREZK. Three hundred and twenty hours?

Mr. RICHTMAN. That is correct.

That is the estimate he arrived at after discussing the volume of work involved in preparing a draft minority report with the vice chairman.

Mr. MEEDS. If he were to work less than that, the contract is prepared in such a way as to not exceed, so that if he would work fewer hours than that, it would not be that much, is that correct?

Mr. RICHTMAN. That is correct, the contract provides supporting documentation as to expenses and the amount of time spent on the report, and $60 an hour.

Chairman ABOUREZK. I would ask Mr. Martone, some lawyers, when they take on a contract fee like that, they will say my hours start from the time I leave my caucus and go to Washington, and that is 24 hours a day. It is a legitimate thing that some people do.

How are you viewing that? Is that from the time you leave home or just the hours you put in working on this particular question?

Mr. MARTONE. It is hours I devote to the task, plus travel time. I computed 320 hours based upon—if it is a full-time effort for 2 months you are talking about 160 hours a month at a 7-hour day.

Chairman ABOUREZK. Your travel time: Does that include after 5 p.m. in the evening, whenever that is?

Mr. MARTONE. Oh, no.

Chairman ABOUREZK. If you are in Washington.

Mr. MARTONE. No; my travel time includes from the time I leave Phoenix until the time I get to Washington, D.C.

Mr. MEEDS. About 4 hours.

Mr. MARTONE. That is right. The figure that was mentioned by Mr. Richtman is a maximum figure which he wanted for his contract purposes. If I spend 100 hours on it instead of 300 hours on it, then we are talking about $6,000 plus expenses.

I sensed some concern over the amount. I think it ought to be clear that that is a fee that is set by the firm with which I am an associate—an employee of the firm. As an individual I do not get that. That amount is an amount that covers overhead, it covers profit, it covers secretaries, bookkeepers, and so forth.

I am sure the committee probably realizes that as an associate in that firm my salary is substantially less than that.

Mr. YATES. Can we arrange for you to take a leave of absence for 2 months?

Mr. MARTONE. If you will compensate me for the loss of good time.

Chairman ABOUREZK. Lloyd gets a whole law firm for that and not just one lawyer.

Mr. YATES. How does this compare with other salaries you pay our own lawyers?

Mr. RICHTMAN. The maximum fees paid, when actually employed for this Commission, is $96.48 a day.

We did try to make an effort with Mr. Martone to try to arrange a leave of absence, or some kind of arrangement with the law firm, so that he could be retained as an individual consultant and be paid directly by the U.S. Senate, but we were not successful, in negotiating that.

The only way to take on Mr. Martone and to have him prepare this minority report was through a contract.

Mr. YATES. I thought he had a well-written Law Review article. I don't know that I agree with him but it was a well-written article. What needs to be done beyond the article?

Mr. MARTONE. I don't know, perhaps that question should be addressed to Mr. Meeds, but I suspect what needs to be done is to provide some balance in terms of evaluating this report, testing it against a wholly different set of first principles, articulating those principles and testing the recommendations and findings of this Commission against those principles to see where results might be different.

It is true that that article constitutes a fundamental ideological composition that is at war and at odds with those views shared probably by the members of the staff and this Commission.

If the draft reports that I have read and examined so far reflect their views. So to that extent I think you get the general trend, and flavor of a different principle from that article.

Mr. YATES. I think your article makes a contribution, but I think the entire philosophical and scholarly background of the question ought to be presented for consideration.

The only question in my mind is the amount of money involved. I think the article is well written, I don't think I agree with it. But the only question I have is with the rate of compensation. If that is the only way we could get him—of course it is the chairman's responsibility, the rest of us don't have to worry about it.

Commissioner DIAL. Mr. Chairman, Mr. Martone, when did you do the article?

Mr. MARTONE. When was it written?

Commissioner DIAL. Yes.

Mr. MARTONE. It was written during an LL. M. program at the Harvard Law School in the academic year 1974.

Commissioner DIAL. You did not do the article for the Commission.

Mr. MARTONE. That is certain. The article was drafted 3 years ago.

Commissioner DIAL. Of course, you would not charge us for the article, hopefully.

Mr. MARTONE. The University of Notre Dame has the copyright on the article.

Mr. MEEDS. Perhaps to clear this up, the article is how I came across Mr. Martone. Mr. Martone, in his article, states a concept of sovereignty which is very akin to my concept of sovereignty, and I think the majority of Americans, clearly not the majority of Indians.

Mr. YATES. You don't know that.

Mr. MEEDS. That is why I use the word I think. I think a majority of Americans. I think it is a view which has to be expressed out of a personal view that we, our staff and our task forces have laid before as a concept of sovereignty for Indian tribes, which is alien to some of the values in this Nation.

At least these other values have to be studied somewhere. Mr. Martone appears to be a very articulate proponent of that position. Now, if there is any responsibility connected with this hiring, I will personally bear that responsibility because I think it is essential that these views be brought out.

He is hired because he is an articulate exponent of those views. I don't know how in hell you put a value on those views. I would certainly hope we could get him for less money, and we tried.

But the fact is his law firm held fast, and, in the absence of paying him what we are paying him, we would not get him. If there is any responsibility for that I will bear it.

Chairman ABOUREZK. You are speaking of your pay raise.

Mr. YATES. Let me read this conclusion from this article and I think you will see that he does express very forcefully an opposite point of view to the one our staff has expressed. He says this: "Largely through his own effort the tribal Indian is no longer the forgotten American. But his effort has raised the question whether his sui generis role in the Federal system can or should survive."

It has been said that to "the extent the tribal Indian asserts an inherent right of tribal self-government, he has not truly manifested his consent to be governed wholly under the internal government set forth in the Constitution." Many tribal Indians would heartily agree with this appraisal.

The Constitution was not designed with tribes in mind. Congress has been caught between changing tides of opinion, running from full separation to total assimilation, but neither is immediately achievable.

The realities apply, the tribe cannot be separate if only because historical forces, and the Indians have already achieved partial integration, are irreversible.

That is the thrust of his article. "The effort then must be to find some imaginative accommodation of tribal interests in cultural identity consistent with the Federal system, and the near certain assimilation of the tribe in the future."

Statehood is a problem. "A State would have to open its borders to all Americans, not just members of a tribe." That would be the viewpoint.

Chairman ABOUREZK. May I ask a question? Is it all right to call you Fred?

Mr. MARTONE. Certainly, Senator.

Chairman ABOUREZK. So we don't have to be so formal. Is it your view that there is no legal basis, constitutional or statutory, for a separate sovereign system of Indian tribes?

Mr. MARTONE. I don't know what you mean by separate sovereign system.

Is what you are talking about: Is there a legal basis for tribal Indians to govern themselves under their own laws?

Chairman ABOUREZK. Right.

Mr. MARTONE. And under laws applicable to them. Yes, that legal basis is the Congress of the United States. It has permitted that through its treaties and its statutes.

Chairman ABOUREZK. So essentially the argument you make is not a legal one but it is a political argument, what we decide is whether or not Congress ought to retain that system of tribal sovereignty, abolition, or go somewhere inbetween.

Is that essentially—am I accurate in saying that?

Mr. MARTONE. I think, you will forgive me, it is an oversimplification.

Chairman ABOUREZK. Please elaborate.

Mr. YATES. Let me read what you have said. "The Supreme Court's role should be limited. It should forthrightly deny the existence of inherent tribal sovereignty (as it implicitly did in *McClanahan* and *Mescalero*) and decide Indian law problems within the framework of relevant treaties and statutes." I think that is what your argument is.

Mr. MARTONE. Let me give you an example of a currently unsettled and controversial issue as to whether or not an Indian tribe has the power to tax non-Indian entities doing business on an Indian reservation.

It would, I suspect, be the views of this staff, at least those I have had an opportunity to talk to in the past 24 hours, that because an Indian tribe possesses inherent powers of self-government and because no congressional announcement has withdrawn those powers, the conclusion would be for them that an Indian tribe could indeed tax a non-Indian entity.

My analysis would be quite the contrary. I would think that an Indian tribe is a self-governing entity, and I would ask what are its powers of self-government, and those powers would be defined by treaty and statute.

In the cases where I have interpreted those treaties and statutes, I would say self-government means government of self rather than others. Congress has permitted Indians to make their own laws and be ruled by them, but it does not mean that they have jurisdiction over non-Indian entities.

Since there is no statute or treaty, that is we are talking in general. There may very well be an individual case where a treaty gives them that authority, and I suspect the Congress has that power.

But in the absence of treaty or statute that gives them power over non-Indians my conclusion would be that they do not have it. That is to say there is no residual of inherent sovereignty.

An analogy I used yesterday with a member of the staff was that principle of municipal law in which under traditional principles, cities, towns and counties operated as political subdivisions of the State, and under the old Dillon's rule, they could only do what the State legislatures said they could do.

They did not have the power independently to do anything else. The trend in the last 10 or 15 years has been home rule amendments in various States, which have amended State constitutions to give the people in political subdivisions the power to do what they want, unless inconsistent with the general laws of the State.

It is quite a different presumption. That is the same kind, although again that is an oversimplification because in each of these cases you have to look at relevant treaties and statutes.

Chairman ABOUREZK. But it is also, I think, a bit off the point in that certainly municipalities are creatures of the State. Whatever powers are given to the Federal Government in the Constitution was given by the States. You don't dispute that?

Mr. MEEDS. He is saying whatever powers are given to Indian tribes are given by the Congress.

Chairman ABOUREZK. I know what he is saying and I will get to that in a minute. But let's just take one step at a time.

You did not dispute that whatever powers the Government has been given to them in the Constitution was given by the States?

Mr. MARTONE. I think there is some dispute as to whether it was given them by the people or the States, but I am not sure whether that is a significant difference in where you are going.

Chairman ABOUREZK. I am not sure either, but nevertheless it is a pretty well established fact.

Mr. MARTONE. That is right.

Chairman ABOUREZK. There is also a theory that the Indian tribes—three treaties have granted to the U.S. Government certain powers, and not the other way around, as you contend.

You contend that the Government has granted to Indian tribes so many powers through treaties. The opposite contention is that the tribes have granted to the U.S. Government certain powers by treaties. That the power the Government has over the Indians, has been given them by the tribes or the Indians themselves, depending on how you phrase it.

Mr. MARTONE. That is the fundamental difference, and I will give you a current application of that principle which would weigh in favor of my view of things.

In the past term, the Supreme Court held, in what has been known as the *Akin* case, that the McCarron amendment, which waives the

immunity of the United States to suits brought in State courts for adjudication of water rights on a given navigable stream, also included a grant by the United States to adjudicate Federal reserved water rights for Indians.

The reason being that the court did not label those Indian water rights, the court labeled them Federal reserve rights for Indians.

It seems to me had they been Indian reserved rights, the court's conclusion would be erroneous. Since the McCarron amendment waived the immunity of the United States, the court held—well, it did not reach whether they waived the immunity of the tribes because they treated those rights as if they were Federal rights.

Chairman ABOUREZK. To get back to my original question, you have not yet answered: Are you really saying that it is a political argument in that it is up to the Congress as to whether or not tribal sovereignty can be maintained, established or faced or abolished or placed somewhere in between?

Mr. MARTONE. That is certain. The whole thrust of my argument and my position is that, consistent with Federal constitutional limitations, the nature and scope of tribal self-government is within the plenary authority of the Congress.

It can, as it did in the fifties, terminate Indian tribes or it can allow them to prosper as quasi-independent governing bodies within the political system.

I think that, as you go in one direction, some serious constitutional problems arise.

Chairman ABOUREZK. Now, you have agreed with the fact that it is a political question.

Mr. MARTONE. Yes, it is a policy question, not only this body can——

Chairman ABOUREZK. That is right, I take it as a personal view. You come down on the side of less sovereignty rather than more.

Mr. MARTONE. Well——

Mr. MEEDS. Mr. Chairman, if I could say, what is more and what is less, less and more than what, what this Commission is recommending, than what a court said in a certain case, than what our staff thinks, less or more than what?

Mr. YATES. Mr. Chairman, it seems to me that it is all very good and well for you to ask this question. But it seems to me that he is very articulate and quite learned spokesman for his position. It is a question that you are going to have to face in your own ad hoc committee when your hearings come along, and the only question in my mind is the question of price.

I think it is an attitude that ought to be——

Chairman ABOUREZK. Yes; we are not debating that. He is hired, we are not debating that.

Mr. YATES. Oh, then fine, go ahead and ask him questions.

Chairman ABOUREZK. I am not interviewing him for the job. [Laughter.]

In fact, I think it is an awfully good thing that there is an adversary viewpoint because debate, I believe, will improve this report. I am honestly convinced of that. All I was trying to do was try to find out what his position exactly was.

Mr. YATES. I was wondering if you were still hiring him, but if that is gone that is good then. Now we can all ask him questions.

Commissioner DIAL. I did not ask the question on hiring this gentleman nor his fee. I only raised the question that we had the same privilege.

Mr. YATES. Sure you did.

Commissioner DIAL. That was all I wanted to know.

Commissioner BORBRIDGE. I have one comment, Mr. Chairman, if I may, since I also raised one of the questions too. I certainly very much agree that, in order for the report and the recommendations by the Commission to have the fullest validity and credibility, that it is important that all available viewpoints be presented to it.

I would be the last to disagree in any way with the interpretation of the chairman and do not suggest that dissenting or minority viewpoints should not be presented. It is very important to the committee that they be presented. After leading off with that, Mr. Chairman, I still want to say that I consider $28,000 to be excessive. I am not suggesting that we negotiate it, but for the record I think it is excessive.

Mr. YATES. For the record I would agree with him on the price, but I would say that I do think he is a talented young man.

Commissioner BORBRIDGE. Very much so, I would agree.

Chairman ABOUREZK. What they are saying then is you are worth something but not that much, I guess. [Laughter.]

Mr. MARTONE. If I were to tell you my salary you would see that the firm feels that way too. [Laughter.]

Mr. YATES. This raises a very interesting question. I gather the impression that in our past meetings we had approved certain sections of the report and what is proposed now is to write minority views. It places the Commission in kind of a delicate position.

Suppose his views are so persuasive that we think we ought to adopt them.

Mr. MEEDS. That was one of the things I was hopeful of.

Mr. YATES. I know you were hoping for that and perhaps that will be, but the point is how can the Commission know where it is going until it has all the opinions. I think the fault is yours, you should have raised this a long while ago.

Mr. MEEDS. That is why I have maintained for a long time that it was improper to say that we were bringing him here to prepare minority views.

Mr. YATES. That, in itself, is not adequate. The ordinary minority view has a majority position explained and then, bingo, at the end you've got some minority view.

What we are faced with now is: What is your position going to be on other matters? He may not agree with you on certain things. He is not your employee now, he becomes the employee of the Commission, as I understand what the chairman has done.

Mr. MEEDS. That is correct.

Chairman ABOUREZK. That is because the Lord giveth and Lord taketh away.

Mr. YATES. That is right, it is no longer Meeds' view, he is part of the staff, as I understand it.

Mr. MEEDS. That is right.

Mr. YATES. As part of the staff he has a responsibility to take a look at what the staff has done in other respects. He may agree with what they have done.

Commissioner WHITECROW. There is a possibility that he might even change his opinion.

Mr. YATES. That is correct.

You haven't had a chance to get at him yet, Jake. [Laughter.]

But I wonder whether or not this changes your time schedule.

Chairman ABOUREZK. No; I don't think it is because we will still have to do it within the context of the schedule. While I think it would have been desirable to have Mr. Martone brought on earlier nevertheless he is here and we will try to work within the context. So, Pete——

Mr. TAYLOR. Mr. Chairman, Mr. Yates' comments do raise certain mechanical type problems that for the most part, I think, we are trying to avoid in this main report here, preparing virtually a legal brief.

I would expect this minority report, particularly having to glance through the Law Review article, would take on very much the character of a legal brief. I think what we need is some mechanism where we will be able to make some reply comments or analysis after we have seen the minority viewpoints.

I think that is a matter that perhaps should be discussed.

Chairman ABOUREZK. May I respond to that? I don't think any of this ought to be a legal brief, to be honest with you. We have a section in there that states legal concepts.

Mr. TAYLOR. But very briefly.

Chairman ABOUREZK. Very briefly, which is fine with me. This is a political document.

Mr. YATES. That is not true, Mr. Chairman, it is a political document based upon the law as it has been interpreted by our staff up to now.

Chairman ABOUREZK. Part of it is based on the law, but nevertheless Mr. Martone conceded that everything we have to do comes up as a political decision and we know that.

Mr. MEEDS. Mr. Chairman, you are expanding on what Mr. Martone said.

Chairman ABOUREZK. Let me finish. It comes up because he concedes and everybody agrees, I don't know of anyone who disagrees, that Congress has plenary authority. No matter where they got the authority they have it.

Mr. YATES. Nobody disagrees with that.

Chairman ABOUREZK. Nobody disagrees with that, therefore, it becomes an absolute political decision as to what we do. The reason for the constitution of this Commission and the work of this Commission and its report, is to try to make a political determination based in part upon legal concepts, in part upon historical concepts, in part upon what is happening today.

What kind of policy are we going to make for the American Indian people. Therefore, I would hope that you don't try to make it legal and fight it out legally in this report. I don't think that is necessary because, basically, the basic legal concepts are there, and you agree upon them. That is, it is up to the Congress to do that one way or the other.

I honestly believe, if you think about this, we have to make the political determination: Does Congress want to say to the Indian

people that you are going to have sovereignty; you are going to be able to determine your own lives, based upon what has gone on in the past 200 years; or are we going to try to continue the job of wiping out the Indian?

Mr. YATES. Without regard to what the court decisions have been in the past?

Chairman ABOUREZK. Court decisions can be wiped out by one act of Congress—every single one of them.

Mr. YATES. So they are not important. If that is true why do we need Mr. Martone.

Chairman ABOUREZK. It is true only in the context of history. They become part of the history of what has happened to the Indian people.

Mr. MEEDS. Mr. Chairman, if I might add: Is it true also, in terms of what the constitutional rights of all Americans are, which are the Constitution and court determinations of those rights? You just can't get away from the fact that whatever position you take on this matter, it has to be at least premised on legal right.

Mr. YATES. Except what he is saying, and it is an interesting argument, that no matter what the legal rights are, that is past. What we have to decide now is what Congress should do.

Chairman ABOUREZK. I am not talking about constitutional rights. Even the Congress can't deprive a citizen of his constitutional rights, and they have done a pretty fair job of it. But technically we cannot do that.

I am not talking about something that comes out of the Bill of Rights that we can't abrogate. We can't certainly go beyond what the Constitution allows us to go beyond, search and seizure, jury trial, things like that.

I am talking about tribal government, tribal sovereignty. I am talking about whether or not we should abide by treaties. That is a political decision, that is not a legal decision. If you have a treaty in effect, its interpretation becomes a legal matter. Maybe you want to wipe out the treaty or not, that is a political matter.

Mr. MEEDS. Mr. Chairman, it is not a political matter, it is a constitutional matter that, by suggesting as a political matter that certain rights be given to Indian tribes, that that deprives other citizens of certain constitutional rights, it then becomes a constitutional question.

Chairman ABOUREZK. What rights do you give to an Indian tribe that deprives somebody of their constitutional rights?

Mr. YATES. Mr. Martone gave an example.

Mr. MEEDS. Exactly, I have been talking about these for several sessions.

Chairman ABOUREZK. Of what?

Mr. YATES. The question of how far Indian sovereignty goes on a tribe with respect to non-Indians.

Chairman ABOUREZK. With taxing on Indians: How does that deprive the non-Indian of his constitutional rights?

Mr. MEEDS. Does the non-Indian have the right to vote on whether or not that tax is imposed on him?

Chairman ABOUREZK. No.

Mr. MEEDS. If he does not he is deprived of a constitutional right.

Mr. YATES. Let's listen to Paul a minute.

Chairman ABOUREZK. There are a lot of people deprived of a constitutional right, if that is the case, because everybody who lives in Virginia and owns property in Maryland is deprived of that right to vote, right?

Mr. ALEXANDER. Constitutional rights run against two governmental entities in the Constitution, the United States and the States and their political subdivisions.

In our view of the law tribes are neither. What you said earlier raises one of the basic conflicts of interpretation between the position Mr. Martone took in his journal article and the position we had been enunciating.

That the tribes retain whatever inherent sovereign rights or jurisdictional powers they have, except for those that have been specifically given up by treaty or removed by specific act of Congress. That is the classic formulation of Felix Cohen and many others.

The view, as I understand it, expressed in the journal article is that tribes have those rights which Congress affirmatively recognizes. That is the baseline distinction.

Mr. MEEDS. That is where we started 2 months ago, as a distinction between what attributes of sovereignty tribes had.

Commissioner BORBRIDGE. If I might comment, Mr. Chairman, I consider in approaching the Congress for a political resolution of those matters impacting the future status and welfare of the Indian nations, I consider that not only the history but the legal basis for the very particular relationship very firmly established between the Indians and the Federal Government, is extremely important.

I would like to think that it would be possible to approach these questions without our having to delve into too much of the legalisms that are involved. But I think not to do so would be a disservice to the Indians.

The Indians contend, and I agree, that a series of Supreme Court decisions, statutes, and for that matter the policy of this Nation—granted sometimes, not observed consistently—has been to move towards a recognition of this very special status.

At this point I would suggest that we separate our approach to the political solutions from the establishment of the basis of the rights which are today being amplified further by other court decisions.

This would tend to deprive the Indians of their argument that there is substance to the rights that they are pressing for. I think that they fully recognize that the Congress disposes and that others propose.

But they are saying, in effect, that if they are deprived of their legal arguments and the very substantive nature of what those rights are that have been firmly established, some before the formation of the United States itself, it would place them in the position of coming to the Congress hat in hand, and I don't think that this is something that they can tolerate.

Therefore, as much as I would be happy if we had less legalism or legalistic language involved in our deliberations, I consider them to be a very necessary part of the record.

It may well be, Mr. Chairman, that some of this can be boiled down, but I think it is very important that the very basic legal premises be a part of any effort, and proposal that we present to the Congress.

My experience has been that each time that I have had the opportunity to approach the Congress on any matter, someone has always asked what are the rights that you have and on what legal principle do you base your approach to this committee.

I have found that we had to go back to legal principles.

Chairman ABOUREZK. If I might respond to that—I don't at all object to the legal concepts as already stated in the draft report so far. What I was really getting at was what Pete said. I want to respond to Mr. Martone's legal argument and we will go after him. That is the instinct of a lawyer, to do that kind of thing, I know, being one myself.

But I think we have to recognize, and it is very important to recognize this, that every one of those legal principles can be wiped out with a single law. It can be wiped out with a single political act.

What we have to do is not only build a legal case for the rights that are in existence, but we have to use those rights that are in existence as a moral principle on which to make a political decision of what it is we are going to do.

If we don't do that, and if we make this a legal tome, at the outset people are going to look at it and say, "What the hell, if we can wipe them out why bother, what does all this mean any way?"

Mr. YATES. What we did 2 weeks ago and 3 weeks ago, or 1 month ago. We spent the whole day deciding what the status of the Indians was, and the status of the Indians depends in great measure on their legal rights.

Chairman ABOUREZK. That is fine, nothing wrong with that.

Mr. YATES. You are right, Congress can pass it or abolish those rights, but we also learned that when Congress passes such a law there is the question of possible compensation to the Indians for the deprivation of their rights.

And as Mr. Martone takes an opposite view on that, as I understand it——

Mr. MARTONE. Not so, there are constitutional limitations.

Mr. MEEDS. Let him explain that, he would be different than the rest of the staff, but he does not exactly agree with what you just said. Go ahead, Fred.

Mr. YATES. I thought he agreed with what I said. I said, if Congress passes a law and it takes some Indian rights away, that the Government has to pay for it.

Mr. MARTONE. Of course, as you state the problem. If it is a compensable right in the first instance. Let me give you an example. In the *Tee-Hit-Ton* Indian case, which resolved the basic problem of Federal condemnation of tribal land, the court said under the Constitution of the United States only the Congress has the power to convey a compensable interest in the public lands.

It sort of assumed, through earlier cases, that Indian title in the sense of naked possession, its claims based on aboriginal possession, was not a compensable interest. That was extinguished by Congress, discovery or whatever doctrine one would like to subscribe to.

Chairman ABOUREZK. Would you clarify that? Say that again.

Mr. MARTONE. Well——

Chairman ABOUREZK. Aboriginal title has been extinguished?

Mr. MARTONE. No, it has not, but in terms of it being a compensable interest, yes, it has been extinguished. What that is, as the courts

have frequently said, is a right to possession which in itself can be subsequently extinguished.

In any event what that case held was that the only time compensation is due on the taking of tribal land is where the Congress has made it clear that it has granted a compensable interest in the first instance, such as by treaty. In fact, the case suggested that the taking of tribal land held by executive order, for example, might not be a compensable interest, depending on what the intent of Congress was.

That is the kind of question that one would have to see what the congressional intent was.

So, for example, to take the chairman's glove that was dropped about the one single statute, the problems in the State of Maine, for example, could be solved very simply with a one-line statute by which this Congress extinguishes all claims of aboriginal possession.

Chairman ABOUREZK. With one exception, the trespass damages prior to the time of extinguishing. We cannot wipe that out, but you are right about the others.

Mr. YATES. Does he agree with you on that?

Chairman ABOUREZK. I don't know.

Mr. MARTONE. I am not sure, because under whose law does trespass lie?

Mr. MEEDS. The chairman is referring to an Alaskan case brought up on the Alaska Native Land Claims Settlement Act, but that has not been to the Supreme Court, as I recall.

Mr. YATES. He is talking about Maine.

Mr. MEEDS. Trespass damages are arising out of the Alaska case.

Chairman ABOUREZK. I am talking about the Maine case.

Mr. MARTONE. If I can put it in what I think the focus ought to be, of course it is a question of policy. All the questions will be questions of policy, the only limitations on that are constitutional limitations. Fifth amendment problems might arise or might not arise, depending on what the underlying thought is.

It seems to me that what you would want the report to articulate is: What law is clear, what law is unclear, what are the contrary arguments, what kind of findings support various arguments? Then, it is only after you have established what the facts are, that you can go forward in terms of policy.

For example, you can talk about trust administration by saying here are principles and this is merely a restatement of existing law, although that existing law is of murky origins.

You look at the principles and it talks about extending services to off-reservation Indians, urban Indians and so forth.

One would argue, and I would argue, that that is not accomplished in existing law. One can argue that it is and one can argue that it isn't, there is nothing clear about that problem.

If you accept a report that says it is a preordained truth that is nonnegotiable and not subject to negotiation, you have necessarily skewed the kind of findings and recommendations that will result from that report.

But I am not suggesting that this Commission should buy any or all of my views. All it should have is a clear, balanced picture of what the state of the law is. As I understand the charter of this Commission it is supposed to examine what the state of the law is, and make certain findings and make certain recommendations.

So you can't just short circuit that process and say, "Well, since we can do anything what difference does that make, let's just do what we want to do." It would be well to know what it is we are working from before you decide where it is you want to go.

Mr. YATES. And what you are wiping out.

Chairman ABOUREZK. I don't disagree with that at all. My point is, I don't want to see the report become just two legal briefs, one by one side and one by the other. It is not going to do any good.

Mr. MARTONE. Let me give you an example.

The draft report would have language that would say why it is obvious, of course, that tribal Indians have inherent rights of sovereignty, without explanation. Nobody really knows what it means. It is not at all obvious.

It is obviously a source of tremendous legal conflict in this country today.

There are assumptions in this that have directed the answer to the question in one direction without mentioning that there are contrary arguments. Those are not settled questions of law as they are being stated here today.

Chairman ABOUREZK: About sovereignty.

Mr. MARTONE. Yes; about many of the issues.

Chairman ABOUREZK. I am not stating that the legal concepts stated in here are perfect, but I am stating that they are generally accurate, in that there have been settled questions in the courts of where the sovereignty comes from.

In effect, what it really says, and I kind of agree with it, is that under the treaties which can be broken by congressional enactment, under the treaties, if we are to abide by the treaties, then that sovereignty does exist.

The courts are not going to break that sovereignty down and throw it away. They say continuously that it is up to Congress to do that. Not every case as you know says that, but a great many cases say it.

Mr. MARTONE. That, it seems to me, misses the mark. To say that a treaty sets up sovereignty doesn't say anything at all. Unless you know what the nature and scope of that is, you don't know what you have in your hands.

Does the treaty permit tribal Indians to govern themselves and make laws of their own making? On the other hand, does it set them up as a political entity, with a permanent right to exist within the Federal system under our Constitution, with power and jurisdiction over non-Indians within its borders?

To say that they have sovereignty does not answer that question. Or, if it does answer the question, it assumes an answer to that legal difficulty.

You tell me that the court decisions have talked about sovereignty, but for each decision that your staff can cite and that you can cite, perhaps I could cite another one.

For example, in *Kagama*, which was frequently cited by this Commission in its report, there is no mention of the language in that case which says that within the broad range of sovereignty there exists but two, the United States and the States.

There is no mention of the language in *McClanahan*, which says the notion of inherent tribal sovereignty is something of a moot point.

We don't look at inherent tribal sovereignty anymore, except as a backdrop to the problems.

We look at the relevant treaties and statutes that define legal obligations. Nor is there any mention of the 10th amendment to the U.S. Constitution, which says that powers exist within the United States, among the various States and with the people.

It is not at all clear to me whether or not an Indian tribe can have powers of self-government consistent with the 10th amendment, unless those powers come from the Congress.

I think my colleagues here on the staff would suggest that that power comes from somewhere else.

Chairman ABOUREZK. It is clear to me that it comes from Congress.

Mr. MARTONE. I don't think it is clear in this report.

Mr. MEEDS. That is not what the report says.

Chairman ABOUREZK. I think they have conceded that in every debate we have had here.

Mr. MEEDS. No; they have not.

Mr. ALEXANDER. The distinction, again, is not that the power emanates from Congress, but that Congress has the power to terminate certain proponents of the pre-existing sovereignty.

Mr. STEVENS. Most of you gentlemen are attorneys, I am not. When we discussed the prolog, the reason that I took the tack of the prolog, that I did in that first draft, is that I feel like we are missing a very important point.

History makes a very important point within the law. I can only speak from my own personal knowledge of my own tribe, which most Indians are in the same position. I am an Oneida, and the Tuscaroras and the Oneidas and the Delawares were specifically dealt with by the United States in such a way that we were separate.

It was agreed that if we would become neutral we would be recognized as being separate. In effect, we have acceded and embraced the United States.

But as a protector originally, and I know it has been a long time, but the original intent of that entire thing was for us to be separate, and it was rather clearly laid out.

In terms of how the thing is laid out, I think we have to lay out some more historical base. Related to the moral arguments you are talking about, I think we have to establish, for instance, that there is a little stronger historical and legal base than most citizens or even Congressmen could suppose.

We have to lay that out and, as a matter of fact, I have circulated a piece of paper of some new documents that have been unearthed, relating to John Hancock, George Washington, Thomas Jefferson, and an Indian agent, by the name of Morgan, that was just found out in California, which the United States has never had possession of.

In this document Hancock empowered this agent to go among the western tribes and they discussed it among themselves—Washington, Jefferson and so on—and said, "Without these western tribes we are going to get defeated".

What they did, they empowered this Morgan to ride out and he did and he had his own agents and he went to the Indians and entreated them to be neutral.

In return for that they said they wanted to be protected, to be separate, and have the protection of their lands. Washington agreed, and it was subsequently in treaty form, at least with the Iroquois.

What I am saying here is that sometimes in discussing legal matters I think we have to have a little more emphasis on the actual history—actually the way that it was.

You were saying we have agreed. We have not agreed to that. I don't know about the attorneys, but none of the Indian people have agreed to the idea.

I agree that Congress can do that. The Indian people—the only reason we agree is that we are too weak to resist.

If there was an adequate international forum, we could defeat the United States in a legal argument. But there is no adequate legal international forum.

There is no powerful protector. Now if it was in 1812 and Congress assumes this position, the Shawnees, the Tuscaroras, the Oneidas and the various other tribes that remained neutral or pro-United States, we could have gone to the British and defeated you, and that is a fact. [Applause.]

All I am saying, sir, is that I differ slightly in some respects. I am agreeing with you but I think the moral argument that Congress should protect the Indian people and should respect their rights, if not even enhance—I would like to point out to Mr. Martone and the other people, we did not come here only to review the law.

We came here to establish rights for Indians. We came here to settle up the Indian business. I find myself often in a position of having our attorneys, I call my turkeys, have the attorneys here which I consider to be very adequate, defending our legal rights, rather than possibly even establishing.

I suggest we may even want to enhance them, that we should plead to Congress. What I am saying is that there is an historical element here that is very important.

Contrary to what Mr. Martone says, it may have started with the people in the United States with the Constitution.

But it did not start that way with us, and if we ever had a chance—it is different now. We logically cannot appeal to any other protector and say, "We are off these guys and we will go in with you".

But it is very important to point out. I feel even in the report, even if we state that the United States and that Congress can abrogate treaties, I think it is also very important that we at least state, maybe not in a recommendation form, but in terms of making it known, that the overwhelming majority of the Indian people feel the same way that I do.

Mr. TAYLOR. I would like to add one comment to what has been said. (1) I agree entirely with Ernie. (2) I would like to say, Ernie, that I think we have advanced legally the position you have just argued, which is that the tribes have these powers. They are not dependent on grants from the United States in order to obtain these powers.

This is the area where our staff and Mr. Martone part company. It is true that the Congress is at a crossroads and the tribes are at a crossroads, and that is what this Commission is about.

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The powers can be wiped out through an act of Congress. That creates high moral problems for Congress to turn and wipe out those problems, as opposed to Mr. Martone's position.

And I think possibly Mr. Meeds', I'm not sure of that. They would have the policy position here, of being whether or not Congress is going to grant these powers, you lose all the moral tone of your argument.

I think we have all argued here, and now again at this third meeting, that the law is on the side of the tribes. And the question before Congress is whether they are going to abrogate treaties, whether they are going to deny powers that they so far have recognized.

This is a very, very critical issue, but getting back to the point I raised a few minutes ago about the need to have some rebuttal here, I am not talking about a continuation of the staff necessarily.

But in this discussion Fred Martone raised the problem of the *Tee-Hit-Ton* Indian case, and the right of the Government to take property without compensation.

The *Tee-Hit-Ton* case did so. However, it did arise out of Alaska. I know there is a lot of case law to the opposite side of that.

The *Tee-Hit-Ton* and fifth amendment taking is something we have not dealt with in this report. It is a brandnew thing that was thrown in here. I think it would be a travesty if the minority report came in here raising a new issue that has not been dealt with or will not be dealt with in the future.

Mr. MEEDS. On the contrary, we did deal with fifth amendment taking. We discussed it at the last Commission meeting.

We discussed the *Tee-Hit-Ton* case, and I discussed it specifically myself. We discussed what would be fifth amendment taking, and you expressed a view about fifth amendment taking which was way beyond the scope of what I thought it would be, and I brought you back to *Tee-Hit-Ton*.

Mr. TAYLOR. Contrary to that, Mr. Meeds, in fact I agreed with you on your analysis of what would be a compensable taking. I said when Public Law 83–280 was extended, it did not create compensable rights.

My colleagues disagreed with me, and I frankly hope they are right. But we did not, as I recall our discussion, essentially accept the idea that taking of property rights particularly is a compensable taking.

Whereas Fred's analysis of *Tee-Hit-Ton* would suggest that we can turn to the *Passamaquoddy* situation and with one statute wipe out their rights with no obligation to compensate.

I would strongly disagree with that, and I think probably you would, too.

Mr. MEEDS. I would have to study the *Passamqauoddy*. I am not very familiar.

Chairman ABOUREZK. I put an article written in Atlantic Monthly last month in the Congressional Record. It lays out the legal basis for some of the——

Mr. YATES. For the *Passamaquoddy*?

Chairman ABOUREZK. Yes, for the tribal history, if anyone is interested.

Mr. YATES. Which issue?

Chairman ABOUREZK. Last month.

Commissioner BORBRIDGE. Two comments. First, I don't think the question has been answered that has been posed by the Commission to the chairman, and that is: Are we going to have a legalistic approach with respect to the dissenting or minority view?

Quite frankly, I think if that is the case, and the question still has not been answered, then I think some kind of response probably becomes important.

Further, Mr. Chairman, it would appear that we are getting into more of a legalistic lawyer type of a forum in the presentation of the case as to where we want to go.

As I listen to the presentation I sense that it is going to be exactly that, it is going to be a discussion of the law, and interpretation of the view of where the law is leading us.

I would like to comment further that we laymen sometimes have to interject ourselves, because the lawyers talk about terms that we don't fully understand. There was some reference to fifth amendment compensable rights or property rights, and I always feel that along with that as reference is made to the *Tee-Hit-Ton* case, it is quite important that reference also be made, made now and made for the record, that the same case pointed out that, although the sovereign in effect has the right to unilaterally extinguish Indian title, that this, in fact, has not been the policy of the United States.

That the United States has chosen, because of the legal rights that the Indians have, because of the policy that this Nation has adopted, to deal with aboriginal right in an entirely different fashion. We must not overlook the dignity and stature of aboriginal title.

There is a tendency then to stop at that point and to move away, instead of taking the further step and saying that it is well recognized that aboriginal title is based on exclusive use and occupancy, and the dignity of such title affirms the rights of the Indians against all third parties, including State governments themselves.

I think the experience in Alaska clearly supports this very position. I think it would be helpful to me to see the discussion almost side by side with the fifth amendment principles that Commissioner Meeds was pointing to.

Also, along with that discussion of the rights that Indians have had which have been supported by a series of Supreme Court decisions, the last thing I want to say here on this point is, whatever the technical aspects, and we may argue or the lawyers might argue and we might listen, as to what an interpretation might be of the law at any given point, I consider that this Commission is more concerned with a process and the development of policy and that is where the chairman ends, really. That is, we are faced with a process, necessitating giving all substantive legal arguments and principles on which the Indians have based their position.

Where does this leave us as a Commission? I would say the responsibility of the Commission would be to act as a catalyst in seeking to bring the United States as the sovereign, with its greater might than the Indians with whom it has dealt, to the highest possible standard of conduct.

And this leads us, Mr. Chairman, to the point that you were making a little while ago.

Mr. MEEDS. Would the gentleman yield?

Commissioner BORBRIDGE. Yes.

Mr. MEEDS. I always get a charge out of the gentleman from Alaska who comes down and says that he is not a lawyer, and indicates he doesn't know about anything.

Let the record show he probably knows more about *Tee-Hit-Ton* than 99 and 44/100 percent of the lawyers in the country, and most other things, too.

But we are missing the point here. The point is we don't know yet that there is going to be a minority report.

That is the first thing. In all probability there will be, because I find myself in violent disagreement with what apparently some, the staff—and there have been no votes on this thing, so we can't tell for sure on specifics—what apparently a majority of the members of this Commission believe.

In all probability there will be a minority report. I will prepare, and if I do not agree with the views expressed by the majority—I will prepare a report.

Whether it is called a minority report—I don't give a damn what it is called. I will write it the way I want to write it, and nobody is going to dictate to me how I am going to write it.

I would take great offense if this Commission tried to establish the form and format that I have to put my views in.

And I think any member of this Commission would.

Chairman ABOUREZK. Who is suggesting that?

Mr. MEEDS. That is why I say, I think the point is moot, because we have not even arrived there yet, and I don't think any one of the members of this Commission would want the Commission to dictate to them how they agreed or disagreed with the Commission report.

Chairman ABOUREZK. Oh, no; I don't think anyone suggested that, Lloyd. In fact, everybody has agreed with the concept that if any member of this Commission has a differing view he has a right to express it, lay it out in full in the report itself.

Mr. MEEDS. As he or she wants.

Chairman ABOUREZK. That has been agreed upon, so I don't see the point.

Mr. MEEDS. I don't see the point of arguing about the form the minority report is in.

Chairman ABOUREZK. Who is arguing?

Mr. TAYLOR. If I might make one further comment. I was at the point of saying that this whole discussion took off from the point of having an opportunity to reply to the minority report.

I understand some discussion has been had as to when the minority report will be filed, whether it will be circulated with the main report which would therefore open it up for an opportunity for at least filing of comment.

That may resolve the problem. All I am concerned about is I would not want some comments to come in that there would not be an opportunity to reply to.

Many of the staff will be leaving, undoubtedly, before these comments come back. I suspect I will be in the city of Washington somewhere, and I will be quite happy to prepare reports on my own time or in whatever capacity I am in.

But it is a mechanical problem of the ability to file some sort of respondent viewpoint. That finishes my remarks on that subject.

Mr. MEEDS. That raises the question of rebuttal. Is there a surrebuttal on this, too? It can go forever. If I write views on this, those views will be expressed on the material contained in the report, the majority report, because that is what it is.

Mr. TAYLOR. My only reply there is that within the context of the analysis here today and the approach to the sovereignty issue itself, all of a sudden this concept of the taking of property was interjected into it, which is a point we have not dealt with.

Mr. YATES. Mr. Chairman, I read the draft introduction, and I don't know that the concept is what the Commission has been given so far or what we seem to have agreed upon or what Lloyd would disagree with.

I turn to the third paragraph:

> It is generally believed, mistakenly, that the Federal Government owes the American Indian the obligation of its trusteeship because of the Indians' poverty, or because of the Government's wrongdoing in the past. Certainly American Indians are stricken with poverty, and without question the Government has abused the trust given it by the Indian people.
>
> But what is not generally known, nor understood, is that the trust relationship and the right to sovereignty is of the highest legal standing, established through solemn treaties, and further erected by layers of judicial and legislative actions.

Isn't that what you said?

Mr. MARTONE. I am sorry, sir. I was pretty much interrupted——

Mr. YATES. Isn't that what you are saying? "What is not generally known, nor understood, is that the trust relationship and the right to sovereignty is * * * established through solemn treaties and further erected by layers of judicial and legislative actions"?

That is not what you have been saying?

Mr. ALEXANDER. No; I would change the words to "recognized by."

Mr. YATES. You would change the word "established." He says "established," and you say "recognized."

Mr. ALEXANDER. That is not our draft.

Mr. YATES. Whose draft is that?

Chairman ABOUREZK. That is my draft.

Mr. YATES. That is what Mr. Martone has been saying; isn't it?

Mr. MARTONE. Mr. Yates, I have not seen what you are reading.

Mr. YATES. This was distributed this morning, and I thought it was the staff's.

Mr. MARTONE. I don't know what you are reading from, and I——

Mr. YATES. It is a draft introduction. I read it, and it seems to me—I did not know whether this was proposed for adoption by the Commission or not, but it seemed to me as I read that, that this is contrary or at least is a deviation from what the staff has told us in the last several meetings and it more recognizes Mr. Meeds' position than that of the staff.

Mr. MEEDS. Do you have a copy of it, Fred?

Mr. MARTONE. No; I don't.

Chairman ABOUREZK. I wrote that. That is my draft, that I, in fact, wrote originally and had somebody else polish it up.

Mr. MEEDS. I wouldn't quite put it that way, Mr. Chairman. I don't think there is any right to sovereignty.

Mr. TAYLOR. I think the word "established" would be subject to some construction.

Chairman ABOUREZK. Let me read a little further in this draft introduction, which I think will summarize pretty much my view on the whole question.

It goes like this: One sentence

> Today we must ask the central question: Is the American nation, now 200 years old and 100 full years beyond the era of the Little Bighorn, yet mature enough and secure enough to tolerate, even to encourage, within the larger culture, societies of Indian people with their own unique cultures and religions?

To me, that is the question that this Commission has to decide.

Mr. YATES. You can do that under Meeds' interpretation or under the staff's interpretation.

Mr. MEEDS. That is exactly my view, this society is big enough and is strong enough to recognize differences.

Mr. YATES. Of course, but that is not what we are arguing about.

Mr. MEEDS. That is not what we are arguing about.

Chairman ABOUREZK. That is what I have been trying to argue about.

Mr. YATES. I think Meeds would accept that.

Mr. MEEDS. Indeed; I believe it.

Mr. YATES. All of us would accept that statement. The question is not whether we will accept that statement, but whether we would accept what I read before.

Chairman ABOUREZK. That is the question.

Mr. YATES. If we can agree on it, then there is no need for Mr. Martone——

Chairman ABOUREZK. Fred Martone raises a different question.

Mr. MEEDS. No; he does not.

Chairman ABOUREZK. Correct me if I am wrong, Fred. Don't you raise the question that perhaps we ought not have that kind of sovereignty? We ought not have those unique cultures within our society?

Mr. MARTONE. No; I don't. The position you are talking about is the position of someone who believes in the virtue of assimilation and, perhaps, the virtue of termination.

I am not someone who is, at this moment in history, for termination. I don't know what the future will hold, and I don't know whether in the next century I might not answer that question differently.

But it seems to me this country can tolerate and encourage within the larger culture societies of Indian people in one or two different ways.

Either within and under the Federal Constitution within the power of the Congress, or in a different kind of way, the kind of way that this report has suggested that there is, perhaps, some other source for tribal self-government.

Mr. YATES. That is not in that statement of the chairman.

Mr. MEEDS. No; but it is inherent in the larger question.

Mr. YATES. It is inherent in the statement I read. That is where it is inherent.

Mr. ALEXANDER. Your law journal article makes the distinction between private and public in terms of assimilation and ability of people—I have not seen this either—to be different and unique.

And supports the notion—it seemed to me in support of the notion that within the private context society certainly could tolerate cultures, religions, customs, and so on that were different and unique.

What we are talking about is not the private context. We are talking about the public context, the political context, governments.

We are talking about tribes as governments, not groups but a cultural identity. We are not talking about the Amish in Pennsylvania. We are talking about preexisting political units which have the powers of political units.

There is a big distinction.

Chairman ABOUREZK. But not so much in my mind, though, because to me that is the end result of a political process, whereby tribes do have these problems and those powers being the only way to retain that unique culture.

Mr. ALEXANDER. I would agree that political status and powers of tribes is realistically the only way that you can retain distinct and unique cultures in modern-day society.

But the problem with this, as drafted, it is like House Resolution 108, in that the average American person who does not have a long history in understanding of the legal concepts in Indian law could read that as being in the finest tradition of American society.

It is misleading on the surface because it is interpreted in a civil rights context, in black history, of Chicano education, bilingual and bicultural education, the rights of poor people, generally, to become part of the larger society.

It needs to make the point that you just made orally. It needs to come and make the political, governmental power point for it to be clear. That would be my comment.

Chairman ABOUREZK. You mean as an addition to this? That is what I have in mind, so why not do it? This is only a draft.

Mr. ALEXANDER. Fine.

Chairman ABOUREZK. Who wants to break for lunch?

Mr. MEEDS. That is an excellent idea, Mr. Chairman.

Chairman ABOUREZK. We will be back here at 1:30.

[Whereupon, at 12:20 p.m., the meeting of the Commission was recessed, to reconvene at 1:35 p.m., this same day, Friday, Feb. 4, 1977].

Chairman ABOUREZK. After giving this question of how we proceed a little thought over the lunch hour, I am going to lay out a proposal here, and if there is not any serious objection to it, I will direct the staff to do it that way.

So far as the markup session itself is concerned, we will continue about as we have been doing. In other words, I want to change the manner in which concepts are brought up.

I think the staff ought to set down specific recommendations, lay it out to the Commission, and then rediscuss it and vote on those recommendations.

That will give anybody who wants a minority view on that vote a chance to start writing a minority view. Now, on the question of whether or not there will be chance for rebuttal, I kind of take exception to the word "rebuttal", I don't think that is the correct way to do it or to say it.

What I thought ought to be done, as each member of the staff writes his or her report or his draft or her draft of the recommendation, for example, Mr. Martone or Pete, if there are two opposing sides on the staff, and this might not run through the whole thing, show them to each other, make them public to each other, so that you can respond within the context of your own draft, rather than having it as rebuttal, because I think that could drag on forever, and that is not good.

Even in a court decision there is plenty of reference made back and forth between the dissent and the majority opinion about the other's views. And that is the way it should be. I don't think there is anything wrong with that. I would then ask the staff, as you finish writing your views on any issue, promptly furnish that to other members of the staff who may disagree with you for purposes of writing either the majority or minority view.

Are there any questions from the staff, first of all, on that procedure?

Mr. ALEXANDER. Just a further point. When we are shooting clearly for a March 9 distribution of the report—just a point of clarification.

To what extent will that March 9 distribution include both majority statements, separate statements, be they Mr. Meeds' or Commissioner Dial's or whoever.

Chairman ABOUREZK. It should be provided before that, if your part of the report is finished it should be provided right away to the other people.

Mr. ALEXANDER. Fine.

Chairman ABOUREZK. As quickly as it is done. I don't think there is a question of anyone trying to surprise anyone else, but what we

want to avoid is the element of surprise on anybody, and I guess that is what you were getting at, Pete.

Is there any serious objection to that?

Commissioner DIAL. I came in late, Mr. Chairman. What did you say?

Chairman ABOUREZK. I said we will continue marking up just as we have been, except that I am asking the staff to lay out a specific recommendation for an up and down vote by the Commission, which will then give anybody who has minority views an immediate trigger to start writing those minority views based on that.

Those views will be exchanged with the majority views, so they can respond to each other. There will be no rebuttal as such, but there will be a chance for interchange of views within the minority and majority views.

Mr. TAYLOR. The objective, then, Mr. Chairman, would be both the majority and minority would be completed at the same time and prepared in the same document.

Chairman ABOUREZK. That is right.

Mr. TAYLOR. That sounds very satisfactory to me.

Mr. MEEDS. After we get the recommendations from the fields, if there is going to be any redrafting, any problems that anyone thinks there was a bad quote or anything like that can be taken care of.

Chairman ABOUREZK. The timetable will not change. In fact, we cannot change the timetable. We have virtually run out of money and run out of time, and if we have to hand in a report that is written in longhand, that is how we will do it.

Commissioner DIAL. That brings up the question, Mr. Chairman, if you are out of money, what are you going to do if some member of the Commission decides that he is going to present a minority view and he needs the money for this?

Chairman ABOUREZK. Well, if you have a minority view, do you think, Adolph, that some member of the existing staff could write that for you?

Commissioner DIAL. I just don't know. Up to this time we have not been able to agree on everything.

Chairman ABOUREZK. What about Mr. Martone?

Mr. YATES. He can write it for you.

Commissioner DIAL. Who, Mr. Martone?

No; I don't think we would agree on anything. [Laughter.]

Mr. YATES. He might agree with you on nonrecognized tribes.

Commissioner DIAL. I am very much concerned with the position of nonfederally recognized tribes, and I am concerned with terminated people, too.

But I talked with Paul a lot about this, and basically we seem to differ on—well, I feel that the term "nonfederally recognized" should go.

Paul does not have this position. He feels that the mechanics of it will work the term out of existence. I don't see it this way. I feel that terms such as "reservation Indians", "on or near reservations", "urban Indians", "rural Indians", "off reservation" and so forth should be the types of terms that should come into the English language, or the Indian language, for that matter.

I take a strong stand in opposition to the phrase or the term or name or whatever you want to give to it of "nonfederally recognized tribes", or "nonfederally recognized Indians".

It really does something to me, and yet I understand the meaning. But the average Indian does not understand the meaning, and it creates confusion, what I call national confusion or maybe worldwide confusion, for that matter.

I think this issue needs to be dealt with. I have not only feelings about it, but like Mr. Meeds, I have strong feelings concerning this and I have had them for a long time, because I have been victimized more than once as a result of this business.

So I somewhat take the view that only an Indian attorney of a nonfederally recognized tribe could really understand and speak to this position.

Because he could speak from the heart. He would know the feeling. Other people would not know. It requires experience.

Commissioner BRUCE. Mr. Chairman, Adolph, does the term to you imply that nonfederally recognized tribes or Indians means that that person is a non-Indian?

Commissioner DIAL. It doesn't imply that to me, but with the average lay person, it means just that, that is what it means.

Commissioner BRUCE. Have you given some thought as to what another term might be?

Commissioner DIAL. I mentioned a few earlier.

Commissioner BRUCE. Nontreaty or something like that?

Commissioner DIAL. Well, I think as a result of treaties—as far as I am concerned, I use myself as an example, a Lumbee, and as one member of the Lumbees, I look at the Lumbees as being a tribe by the way, whether some call them a tribe or not. I recognize them as a tribe.

A tribe of Indians who never did sign a treaty with the Government. We are what I call "off reservation Indians," who are not looking for "BIA benefits," at least not all BIA benefits.

But we are looking for and to receive such benefits as those for Indian education, under the Indian Education Act.

This is the feeling of all of our people and according to their 1970 session, the Lumbees of Robison County were listed in Mywong County as 27,000 out of a total population of something less than 90,000.

For many years we had segregated schools—black, Indian, white. As a matter of fact, since 1885, for almost 100 years. So we are not something that popped up out of the woodwork overnight.

We have been around a long, long while. But yet, prejudice is there in Robison County, and we have to fight for what we get.

We are hard workers. We do a good job. We are trying to buy back all of the lands and as much as possible in Robison, we are doing a pretty good job. We are on our way.

But the thing that concerns me more than services, speaking personally now, the thing that concerns me more than services that comes from the Government is, this is such a stigma as nonfederally recognized tribes.

I was in a city in the Midwest last week, and one Indian member said to one of my friends who is from the reservation, he told me

later, he said, "Get ready for this—get ready for a shock. So-and-so says that you are not Indian." Well, I said I would expect this to come from this person. Now, it gets back to what Senator Abourezk said in the very beginning.

We need to do a lot with this business of definition of an American Indian. Who is an Indian? What is an Indian? What about the classsifications? Where do they fall?

I, personally, do not like the existing nonfederally recognized tribes. Now, I am under the understanding, in the beginning of this Commission work, that we were going to ditch this business.

Or, we were going to ditch this term, "nonfederally recognized tribe."

Chairman ABOUREZK. Adolph, may I ask what you would have in mind to replace that?

Commissioner DIAL. "Off-reservation Indians."

Mr. ALEXANDER. Adolph, our reservation was not on ditching the term. We can go back to November, when I related to the Commissioners what I felt was very strong feelings of Indians in the New England area had raised at the Boston hearing about the term.

Our disagreement, it seems to me, was on the substitute term. My point was that any term, classification, which has the effect of excluding a certain class or group of Indian people from the political relationship with the United States, will in time end up like the term "nonfederally recognized" and become a term which quantitatively denies Indian existence.

Commissioner DIAL. This is where we disagree. I don't think time will do it.

Mr. ALEXANDER. That, I think, at the moment, is a subject that is quite open to discussion. What we have done, and that chapter is not complete, but in the draft of direction and principles that we presented to you in November, what we did was an opening declaration by Congress about recognizing all Indian peoples as Indian people.

Without any regard to whatever the particular political relationship may be and what service components may be included therein.

The second form of that, which is where we got into some detailed discussion, was opening up or creating a new administrative mechanism to correct what the task force and many others view as the historic accident or series of accidents of exclusion of many tribes from—I don't use the term nonrecognized and recognized, but terms that have a political relationship with the United States that creates certain obligations on the United States.

This is the essential concept we are talking about.

Commissioner DIAL. Mr. Chairman, may I direct a question to Mr. Alexander?

At what point, Mr. Alexander, would a nonfederally recognized tribe have a political relationship with the U.S. Government, if they had never been involved with, say, treaties?

Mr: ALEXANDER. If you may recall, we set out a number of standards which would govern the executive branch in determining which tribes were subject to the political relationship.

Treaties were but one such criteria. If I remember the discussion, the Lumbee Indians must currently reside in Robison County, qualified, if you will, at least on two of the standards we were discussing.

The second component of that, which gets to your question of services, was that then the tribes and the representatives of the executive would discuss and negotiate what were the service components that were desired, and that that be specifically taken to Congress for supplemental or specific negotiations.

Those are the broad outlines of what we are talking about. You and I have talked about them since then

Commissioner DIAL. Mr. Alexander, will you tell the Commission what the 1956 act did to the Lumbee people? And what the last sentence of the act did.

Mr. ALEXANDER. At this moment I would not tell you what the last sentence is. I am sure you know what it is. What is the last sentence?

Commissioner DIAL. First of all I know Congressman Meeds is familiar with this, because he did appear before his committee.

In 1956, Congress recognized the Lumbee Indians as Lumbee Indians. But all recognize that that is the time of termination for many tribes. Someone saw fit to put a rider on the bill that came from North Carolina.

This was first passed in the North Carolina Legislature in 1953, and the last sentence said something to the effect that Lumbee Indians will not enjoy the same privileges and so forth as other Indians.

So even CETA funds coming down to North Carolina to the Lumbee Regional Development Association, or—what is the outfit that Mr. Bluespruce was head of not too long ago——

Mr. ALEXANDER. Office of Native American Programs.

Commissioner DIAL. Yes; ONAP. People here in Washington wanted to say, "Well, you people don't qualify for that because of that last sentence." Last week, someone in the Detroit area, some individual was qualifying for a State scholarship set up by the State of Michigan, a Lumbee Indian.

He was trying to qualify, and they called Washington, the BIA, I don't know who they talked with. They said, "Well, tell us about the Lumbee Indians", and he said "Well, they would not qualify for your special scholarship".

Yet we would, one that was set up by State legislation in the State of Michigan. This is the kind of trouble that we constantly run into, week after week. I was hoping that if the Commission did anything as far as nonfederally recognized tribes, it would take care of some of these problems.

And that it would not leave them hanging just as they are at the present time.

Mr. ALEXANDER. Mr. Dial, the legislation we are proposing would, in effect, overrule any ambiguity that exists in the last line of the Lumbee bill.

As I am sure you are aware, there is good, legal argument to say, and consistent with the theory we have been taking that, yes, that act does not confer any additional rights to services, but it does not preclude whatever rights might exist in the Lumbees for services.

Commissioner DIAL. What I am saying thus far is I am not sure what it would do. I would not bring it up at this point. It is rather vague in my mind, and I wish you would enumerate more.

I wish you would spell it out more. It is too vague in my mind.

Mr. ALEXANDER. I think your objections are well taken and hopefully we will have a full draft of that chapter within the next week to 10 days, and I will send it to you immediately and hopefully we can sit down with it.

Commissioner DIAL. All right. Now I say to the Commission at this point, if this draft is not satisfactory, I shall proceed with, next year, in the direction of hiring proper counsel to write and advise on this situation.

Mr. MEEDS. Would you repeat that last thing again, please?

Commissioner DIAL. He says hopefully he will have something written on this issue that we are discussing next week, to have in my hand.

I will give him 10 days. If it does not resolve this matter in my mind, I will proceed in the proper way with a minority report, by contacting the chairperson, Senator Abourezk, and Max, here, in working out the details.

But I raise the question, too, because you talk like you are out of money, and if something new comes up, I wonder, what are you going to do when you don't have the group together to appropriate or to ask for more funds?

Mr. MEEDS. I am sure that any reasonable expenditure for minority views on off-reservation Indians, so-called nonfederally recognized Indians, we could come up with it.

Commissioner DIAL. OK, I have no more discussion on that issue.

Mr. MEEDS. Very well. Let's move to the subject matter before us. The first matter of discussion was the demographics. Who is handling that? Paul, would you like to proceed with that, please?

Just give us an overview, and a summary of conclusions, if there is such a thing. I don't know that there is on this.

Mr. ALEXANDER. There is one recommendation. The overview could be stated in one sentence, which is: We know less about Indians in 1977 than we did in 1877, in terms of data collected by the Federal Government and others.

The first part of the chapter is gross statistics. Those are being validated at this point. There are some errors in there.

The second part of the chapter is an analysis of the data systems and there are some fairly gross examples of inadequacies.

What is recommended is a reinstitution of an annual reporting system from the Executive. Our view, consistent with the view of a consolidated Indian agency, is that that agency should take the responsibility.

There is a very detailed outline provided by the Library of Congress as to the type of information that should be annually provided to Congress and to others in Indian affairs.

The point made from the Library point of view is that every time a congressional committee needs to act on Indian affairs, it has to commission independent research, that the data systems are terrible.

They, in fact, used to be a great deal better when there was an annual report of the Commission. With modern statistical systems and computers, there is no reason in this day and age why the data system shouldn't be a heck of a lot better than it was 100 years ago.

That is the essence of that chapter.

Mr. MEEDS. Any questions or suggestions on demographics?

Commissioner WHITECROW. One point. The demographics that would be gathered in the annual report would be representative of all statistics needed in the development process by a tribe: Is that correct?

Mr. ALEXANDER. Yes. As a matter of fact——

Commissioner WHITECROW. They would include all age limits, men, women, children, and so forth?

Mr. ALEXANDER. Yes.

Commissioner WHITECROW. They would also include, as I understand, a valuable update of lands owned by the tribe, resources, minerals——

Mr. ALEXANDER. It would build a basic system and keep it current. We are operating in an area of statistical ignorance.

Mr. YATES. Paul, how do we know all the demographic information? As I listened to you talk, the impression that I have is that at least the testimony before my committee on the BIA, they don't know how many Indians there are.

They don't know what their ages are. How are we going to have valid, demographic information?

Mr. HALL. I was going to say, Congressman, the demographics that we have there are as accurate as is available.

As you say, the Bureau of Indian Affairs, the Census Bureau, the Library of Congress, everyone recognizes that they are inaccurate and in some cases not reliable.

We tried to point out the draft on that was done by Congressional Research Service, which deals with this kind of data.

Mr. YATES. The best we can get.

Mr. HALL. Right. They pointed out as much as possible the shortcomings, and that is the reason why the final part of that chapter was drafted with Steve Langone, of Congressional Research Service, saying we need better information.

We have gone with what was available.

Mr. ALEXANDER. The truth is, the Government does not collect the type of data it used to collect.

Mr. YATES. Maybe we should make a recommendation to the Census Bureau to seek that information specifically.

Mr. ALEXANDER. I can include that in the redraft.

Commissioner WHITECROW. In addition, Mr. Chairman, the demographics that we really require should be available right at the tribal office. The local agency operating that tribe should have that type of information available at all times.

Today, they don't have, because of the migratory aspect of Indians, as they travel around the country. We have a difficult time of determining who is eligible for these many programs.

As you recall, Mr. Yates, we were talking about funneling all of these various programs back into the tribe, and/or requiring individuals to be identified as tribal members before they are eligible for these services.

This is one of the reasons why I was speaking to this particular aspect of having these bits of information, along with the tribal citizenship, validated before any funds could actually be allocated to a particular school in the educational process, or to any particular organization. If they are saying that they are actually helping Indians, then they should have some method of validating that the individual receiving help is, in fact, an Indian.

In the appropriations process we certainly need to have this kind of information available so we know exactly how many dollars are necessary, and this is one of the reasons why I really support this management review and the budgetary process in that development, so that the tribe could develop how many dollars is needed for the Federal Government to fulfill its responsibilities and obligations.

I would think we need to recommend here that that information be gathered locally, which would require individual tribal citizens to maintain at least an annual contact with their tribe, giving their tribe that information, and letting the local superintendent work with that tribal government to develop this kind of information.

Then I see the Commissioner of Indian Affairs, or whatever his title may be, as that individual that could compile this kind of data, based on information given to him by the tribe, which would be an accurate annual update.

Is that the concept you had here?

Mr. ALEXANDER. Well, I think that is a very interesting concept, and it may be one of the ways that this data could be collected. Maybe the most appropriate way.

The thrust of this recommendation was not that detailed. The thrust of the recommendation was that the executive branch reinstitute the practice of expansive data collection, which they are not——

Commissioner WHITECROW. Mr. Chairman, based upon that I would recommend, and so move, that we lay out this type of data-gathering system for the administration to follow in our recommendation to them.

Otherwise, we are going to be lost in the mill once again.

Chairman ABOUREZK. I did not hear what type of data-gathering system.

Commissioner WHITECROW. Allow all of the demographics of the tribe to be developed at the local agency, in coordination with the tribal government. The tribal government should be actually, in effect, gathering the data concerning the tribal members and resources.

The tribal government should depend upon this data gathering collection.

Chairman ABOUREZK. Again funnel it through the central office?

Commissioner WHITECROW. Right.

Mr. YATES. What about the urban Indians?

Chairman ABOUREZK. BIA and Census should be responsible for that.

Mr. WHARTON. I think that what Commissioner Whitecrow is saying is very important. The reasons are that we took a good deal of testimony in Indian country about the basis of funding being on population for a number of different kinds of programs.

I know the Bureau of the Census is more aware than they were before about the impact of their figures, particularly on Indian country, and they are doing more now in taking steps toward developing a more sophisticated system of identifying Indian people for those kinds of reasons.

I think the system that the Commissioner has outlined is helpful and will go far toward doing this. But I am concerned, having worked for an Indian community, about the kinds of funding that is necessary for them to do those kinds of demographics.

I would add to what the Commissioner says, that funds be made available to them to do that in conjunction with the Bureau of the Census.

There is no reason, I wouldn't suppose, to have a duplication of effort on behalf of the Indian agency and Bureau of Census figures, because Bureau of Census figures are used often to fund programs.

I suppose where there is a discrepancy, they would rely for Indian programs on the Indian agency figures. I know from my own personal experience, by doing population counts and those kinds of demographics are expensive and difficult.

I would add, with your permission, that funding be made available for that purpose.

Commissioner WHITECROW. Mr. Chairman, if I may, sir, following up on this particular attitude, the Bureau of Indian Affairs management study that we have done also indicates the primary responsibility of that superintendent, right there at that local agency, that is one of his primary responsibilities, to work with that tribal government and develop the budget necessary to provide the needs of the tribe.

That, I assume, perhaps it is a wrong assumption, but I assume that that would be a part of the administrative budget for that particular agency. At the present time we have superintendents out there that the Indian people don't know what their job is.

We have superintendents out there that don't know what their job is.

Mr. ALEXANDER. We are addressing one component of the data collection system, which is data collection in the tribal settting.

But there are several different areas of data collection. One of the general recommendations by a number of groups to Census is the involvement with the indigenous community in the data collection.

That process would only work partially in the Chicago setting. It would only work partially in Robison County. There has got to be several different alternatives, alternative steps in the data collection process, I would think, in addition to the one you have mentioned.

Mr. MEEDS. Mr. Chairman, may I just raise one problem here? The demographics that are gathered have to have credence because they are going to be used to interface with Federal programs in which other segments of the society are competing.

Example: The last distribution of funds under the public works program, the hue and cry from all of the western States that a disproportionate share of the funding under the Economic Development Administration public works emergency programs went to Indians because of the BIA's method of keeping statistics on unemployment.

It showed a disproportionately large amount of unemployment on reservations. Now everyone in this room has used those statistics.

Unemployment on Indian reservations is probably higher than it is anywhere in the United States, generally speaking, with the exception of the central areas of the large cities, unemployment on reservations is higher than it is anywhere in the United States. But the peculiar way that those statistics are gathered and kept, and the definition of unemployment differing between the BIA and the Labor Department, infuriates the cities, counties, and other entities of government who have to compete with that.

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I will tell you what is going to happen to EDA this time. I predict that EDA will make a separation and will take out and earmark special funds for Indian programs so that all Indians will be competing against these funds, and not against the unemployment statistics otherwise.

Now you watch. That is going to happen. And it is largely based upon the demographics, statistics which are gathered and are non-uniform with the other entities which are competing for the funds from the same programs.

I think we need better statistics, but I think, again, we cannot operate in here in a vacuum. Indians are going to be in these programs, competing with other entities

And the other entities have political muscle. If Indian programs are perceived not to be using the same kind of analysis and same kind of basic statistic gathering as the entities that they have to compete with them they are going to overwhelm them.

Commissioner BORBRIDGE. Mr. Chairman, I agree with the need for better statistics, too, having observed the Indian experience in which the U.S. Department of Labor among other bureaucracies, using again the criteria neither accepted by nor fully understood by the Indian population, in making determinations which in the view of myself and others have been injurious to the Indians who, with a more reasonable approach to determination of the statistics, would have been in a much better position.

I think it is important to state, we are all concerned with credibility. And we have seen examples of how the statistics, because they have not fully been established as being acceptable from the objective viewpoint, operated in either of two directions.

Congressman Meeds, you have indicated one direction, and I have indicated another, and we realize that this is the overall concern we have. There is no question, we do want better information.

I am concerned that if we were to move toward a motion, I see the need as being such a complex one that I would almost hope that staff might be directed to produce the kind of resolution which may address itself to the entire complex problem of demographics. I see a need for one that would be regarded as being credible.

Commissioner BRUCE. Mr. Chairman, I agree with Jake Whitecrow. But I also want to call attention to page 3, the top of the page, which to me is a very important thing.

Who are Indians? How are they identified? We have here no clear standard definition on anything. We are talking about BIA. You are talking about the superintendent.

Lots of times the degree of Indian blood determines what kind of services those people—right in that agency, Jake—can get.

So what are we going to do?

Mr. ALEXANDER. We agree with you, and we are cognizant of that gap in the materials to date. What I have done is to have an additional section of the legal concepts chapter drafted on that issue, and we will be presenting that to you at the next meeting.

Commissioner BRUCE. Drafting a definition?

Mr. ALEXANDER. Yes. It should engender a great deal of conversation.

Commissioner BRUCE. Some people I talk to, depending on where they are, and we are talking about the census, will either say that if they don't they might lose their job in some situation.

We have to take that into consideration, too.

Mr. ALEXANDER. On the statistics—to pick up what John was saying—it is such a double-edged sword in the situation you talked about, in revenue-sharing funds there is substantial undercutting acknowledged by the Bureau that works to substantial detriment.

Under OMB circular 846 the vast majority of Federal programs are to operate under Bureau of the Census data in their allocation of funding.

For practically all programs Indian people are at a substantial disability based on the inaccuracy in the substantial undercount of the Census Bureau.

Commissioner WHITECROW. I think it is a very important point. We have all the way through our deliberations here discussed the real requirement of defining Indians.

Your comment on page 3, Commissioner Bruce, goes far in the definition of an Indian. If we have in the past agreed that the tribe has some semblance of sovereignty, very definitely that tribe has the right to determine who its Indian citizens are.

If we come in this particular case, plus the task of defining Indian Americans, it is not the Federal Government's responsibility to make this definition, in my opinion.

It is the tribe's responsibility to make that definition, and it is not the Bureau of the Census responsibility to make that definition.

The tribes should, in effect, notify all persons that they accept as Indians. They should notify those people that they accept them as Indians, as members of the tribe, or whatever, and then these people can identify themselves as Indians. They must have some method which will require or have that tribe contact them. Otherwise, we will be in the same condition 10 years from now that we are in today.

People all over the country are saying, "Well, who and what is an Indian?" If we don't have this return to the tribe, wherever an Indian is, urban Indians must maintain contact with the tribe, if we are really going to lay down any kind of strong support for this entire report.

If we once again can move away from the tribal relationship that establishes the government-to-government relationship by treaty, then we are moving right back in again, and looking at an Indian in an urban situation as just another citizen of the United States.

We must recognize that individual Indian has dual citizenship. He is a member of his tribe and he is a citizen of the United States.

As such, any moneys provided to the tribe to fulfill obligations come through the relationship that has been established, whatever that relationship may have been. Therefore, the individual Indian is a beneficiary of a trust, but he must go through his tribe to establish that beneficiary.

If you don't recall, there is data to be gathered, and if necessary make recommendations to change that particular policy that is within the Bureau of the Census, then the credibility of this must be established at the local problem level, the credibility of that report, and the demographics.

After all, who is in a better position to make that determination than those people at the local level?

Commissioner DEER. I think it is inexcusable that in this day of computers and modern technology, that we have so little accurate information available. I recall in 1960 Indians were listed in the Bureau of the Census report under "other", and some of us screamed and yelled, and this got changed in the 1970 census data.

But I think that we need to make a strong recommendation that this be corrected. Over the years many Indians have been shortchanged, and I noticed that there is very little protest when we get shortchanged. But when we seem to get more than we deserve there is a lot of screaming and yelling in protest.

I would like to say, to quote one of my heros, Whitney Young, "We have a long way to catch up, and it is going to take time to catch up." Other people need to know this, and keep this in mind if we are going to fulfill the obligations of this Commission, and also if the Indian people are going to catch up.

Mr. MEEDS. Further questions? Commissioner Dial.

Commissioner DIAL. Commissioner Whitecrow, I take it you are saying that it is the U.S. Government's business to recognize the tribe, and it is the tribe's business to recognize its people; is that correct?

Commissioner WHITECROW. Correct.

Mr. MEEDS. Further questions or observations by members of the Commission on the section on demographics?

Very well, thank you, gentlemen. The next presentation is on Federal Indian trust relationships. Who is handling that? Gil Hall will be handling most of that.

Why don't you give us, very quickly, an overview of the recommendations and the rationale for such recommendations?

Mr. HALL. You will recall that this is the third time we have looked at this chapter and substantial portions of it are the same. It started out in the meeting in November.

However, there have been a number of changes as a result of that last meeting, and suggestions. But before we get to those changes, in light of the conversation this morning, I would like to point out a couple of things in the narrative.

The first 14 pages of the chapter are a narrative that provides a historical and legal background for the recommendations. The recommendations are pages 14 through 18, and a brief explanation of those recommendations starts at page 18 and goes to the end.

If you will look briefly at the bottom of page 11, the last paragraph, it says:

> The Department of Interior appears to lend a very narrow interpretation to the custom concepts by permitting its applications to the lands, natural resources, and management of trust funds of "rightfully recognized tribes."

Not only is there little reason to restrict the document, but there is considerable legal authority that the United States trust is much broader. You will see that in that narrative, I am not attempting to say that everything in here is the law, but what I am saying is there is a considerable legal argument, and we feel a strong one, to support the position.

Also that policy should go in that direction. Also, on page 21 of the chapter, the first full paragraph it says:

It should be noted that there is presently considerable support in statutory, judicial, and constitutional law for the principles set out above.

Consistent with Supreme Court mandates, these sources have been read in favor of Indians as they would have understood them. Thus, to a considerable extent, these principles are merely a question of recognition of existing law and as such are intended to give clear guidance to administrators on how the trust should be carried out.

Mr. MEEDS. Gil, could I ask you to go back for just a minute, to page 12, "considering the legal authority," et cetera.

This does not necessarily imply a limitation to recognized tribes on reservation lands or land related services, et cetera. Where is that carried out in any of the recommendations?

Mr. HALL. I am sorry, where is——

Mr. MEEDS. That statement carried out in any of the recommendations? This does not necessarily imply a limitation to recognized tribes and so on.

Mr. HALL. The recognition question is not dealt with specifically in this chapter, as we were discussing earlier. It will be dealt with in that chapter in which we hope to eliminate the terms recognized and nonrecognized.

For purposes of this chapter, recognized would be all Indians.

Mr. MEEDS. I have to at least indicate my disagreement. My feeling is that the trust responsibility runs to those with whom treaties have been signed and to whom in other ways a legal trust responsibility is manifest.

I don't think there is, for instance, any trust responsibilities to a person who is not a member of a recognized tribe. I agree with Chief Whitecrow totally here. To a person, who is not a member of a recognized tribe, each tribe has either a treaty right or a right by statute by the Congress.

Chairman ABOUREZK. Do you mean which tribe does not have?

Mr. MEEDS. Which tribe does have a recognized—by treaty or statutory or by judicial interpretation, something. I think this trust responsibility has to rest upon treaties, upon agreements—both executive, legislative, and judicial interpretation—and then it should not extend beyond that.

Mr. HALL. Are you excluding statutory law, sir?

Mr. MEEDS. No; I am specifically including statutory law.

Mr. HALL. OK. Page 12, later on in that same paragraph, and this also is revised slightly as a result of our last meeting, and some suggestions from Congressman Yates. You will see that it does imply, however, an obligation to provide those services required to protect and enhance large resources and self-government.

And so it would be those economic and social problems——

Mr. MEEDS. Where are you now?

Mr. HALL. Page 12, first paragraph, the sentence immediately following the one you referred me to.

What I am getting to, the end of that paragraph reads:

This has been recognized implicitly by Congress in numerous acts including: the Snyder Act; Johnson-O'Malley; Native American Programs Act of 1974, which established ONAP; and the Indian Self-Determination Assistance Act.

The reading we are placing on that, Congressman Meeds, is that these acts, among many others, are an implicit recognition by Congress that the trust is just broader than a recognition question.

Mr. MEEDS. I hate to disagree with you but let's take the Johnson-O'Malley Act. The utilization of the Johnson-O'Malley Act has been restricted to reservations and schools only on reservations. The reason for that restriction is precisely what I am saying, and contrary to what you are saying.

It has not been used as an enlargement but as a restriction on who is an Indian and to whom should a service begin. Otherwise Johnson-O'Malley would have run originally to all school systems everywhere, but it didn't.

It was restricted to Indian reservations. I don't know what you are calling all these other things, I don't know what in the Snyder Act you relied upon for the Native Americans Programs Act, or the Snyder Act, as you are aware, the language is quite broad and it says Indians throughout the country.

The legislative history of that act and some case law, I will grant, does not nail down our interpretation. But I do believe there is strong support for that interpretation.

Mr. MEEDS. I recognize that you can look at it either way. I there are cases on both sides of this and interpretations on both of this. Clearly the BIA, over the years, has interpreted everyt. that has gone down there in such a way as to make it federally recognized on or near reservations.

In fact, they have even had problems in "near reservations." So they have been as restrictive as I think you probably could be.

I don't know that I agree with them as a matter of policy, but I certainly agree with them as a matter of law.

Mr. ALEXANDER. In the Johnson-O'Malley Act—Karl Funke has been a member of our staff for quite a while and has done a good deal of substantial research on the congressional intent in the original Johnson-O'Malley Act and I would like him to comment on that.

Mr. FUNKE. The original intent of the act was not to go to reservation Indians. In fact, the specific intent was to go to nonreservation Indians—Indians that were dispersed among the general population.

It has only been through administrative changes in the regulations over the course of years which has changed it from being an exclusively nonreservation act to strictly reservation Indians.

Mr. MEEDS. You might know it better than I do, but that is not my interpretation of the Johnson-O'Malley Act and the intent and purpose of Johnson and O'Malley. It was to aid local school districts that were so situated in areas where there were larger numbers of Indian children.

Mr. FUNKE. As a result of the Allotment Act, a lot of Indian tribes were dispersed into the general population, and it was becoming uneconomical for the Bureau to provide health care, education, and those kind of services to those Indians who were no longer members of tribes but were being dispersed into the general populations of the States, and States were refusing to pick up the slack and provide this educational and other kinds of services.

It was a method by which the Federal Government could contract with the States to provide those services.

Commissioner WHITECROW. Mr. Chairman, you made a statement there, and I am not sure I am quoting right. You said that that particular law was provided so that Indians, who were no longer members of the tribes, were provided for as Indians.

Mr. FUNKE. Right.

Commissioner WHITECROW. Where does it state in any legislation that when an Indian leaves the reservation he is no longer a member?

Mr. FUNKE. Well, a lot of the members of the various tribes were being moved off the reservations to boarding schools and not returning to the reservations, and were losing their tribal ties with their tribes. Some of the tribes were disappearing at that point, through the allotment process and through boarding school processes and other processes.

Commissioner WHITECROW. The mere fact of their relocating, that, in itself, did not remove their citizenship status, did it?

Mr. FUNKE. No; but the practical effect of it was that a number of them did not continue to have tribal relationships with a tribe.

Commissioner WHITECROW. This is the assimilation process.

Mr. MEEDS. It is an effort by the Federal Government to carry out its treaty obligations to members of tribes.

Commissioner WHITECROW. Wherever they may be.

Mr. MEEDS. Right, identified with the tribes, I don't think there is any question about it.

Mr. TAYLOR. At one point in our legal framework it was considered that an Indian who was a citizen of the United States necessarily lost his citizenship in the tribe.

This allotment area, that Karl refers to, was alloting parcels of land to Indians individually and providing that they became citizens of the United States. The basic concept was that he acquired U.S. citizenship, he lost it in the tribe. This was the evolutionary process by which tribal governments were to be dismantled.

Mr. MEEDS. Peter, I hate to disagree with you, in that original Allotment Act there is a specific proviso provided that upon the acquisition of this citizenship, it does not exclude tribal and Indian rights. I just looked at that recently.

Mr. TAYLOR. It does not exclude his rights to share in the communal property.

Mr. MEEDS. No, no; it says tribal rights. Has anybody got the act here, I will show it to you.

Mr. TAYLOR. I am afraid I don't.

Mr. MEEDS. I looked at it for another reason, it was not for this. The argument is now being made in Washington State that because they became U.S. citizens they lost their tribal rights.

Mr. TAYLOR. I was going to point out that that legal posture has changed and the 1924 act, I think, has killed that legal theory.

Mr. MEEDS. The exact language is in both acts. It says provided that this acquisition of citizenship under this act shall not infringe upon or deny tribal rights.

Mr. TAYLOR. Congressman, the statute might say that but I am aware of judicial decisions that were so holding, and all I am saying is that this legal theory was there. It is no longer a valid, legal theory.

Whether that was the intent of the act or not, I don't know, but I do know that Federal courts are making rulings along that line. There is always difficulty in determining who an Indian was.

At any rate, the concept of paying money to States, I believe, preceded Johnson-O'Malley, so this theory might well have been floating at the time Johnson-O'Malley was enacted. It would have been in disrepute by that time, but it would tend to support what Karl has said.

But I agree, it is no longer a valid theory at all.

Mr. HALL. We are not suggesting in this language that the trust is independent of the tribe with respect to individuals. It is just to the contrary on page 13, the lead sentence in the first full paragraph says it should be noted that the trust application extends not only to tribes, as government units, but also to tribes, to their members, wherever they may be.

We are making two points; one, is that it runs to individuals through tribes, and two, that it does not necessarily stop at the reservation gate, just because an individual leaves that reservation.

Mr. MEEDS. Mr. Chairman, in this whole area I think I probably would agree with Jake, only I think we have to go one step back of where he started.

I think we first have to describe what is a tribe. I think we have to set up a mechanism for recognition of tribes that have not been recognized but should be recognized, and we have to set up a mechanism for restoration of tribal status.

Then I think we have to let tribes identify their own population. I agree with you they should, and we ought to put time frames on this kind of thing. Then when we get to the end of a certain time, we either identify what is a tribe, who are the members of the tribe, and we therefore have identified who is an Indian, special treaty rights, and special statutory rights, in my mind, do not run to anybody other than those identified people.

Now, we may do this, especially for Indians, as we have under some of the acts mentioned here—the Native American Programs Act—because they have been individuals who have been deprived in the past of certain rights—just like blacks, and others, who are now in necessitating circumstances—and to treat them on that basis because they are Indians.

We might set up special programs just for Indians because they will relate better to them as we have in the Indian Health Act, as we have under the Native American Programs Act, because they relate better to them. An Indian center—Indians will go there. They will not work well.

In center city regions with the blacks organizations, we all know that. So we may be setting up special programs to deal with them at that respect. But it is not to deal with them for any other reason in that level than the fact that they are disadvantaged Americans. That is my own view and I intend to write that kind of a view in a report that comes out.

You can join me if you want to.

Commissioner WHITECROW. Mr. Chairman, if I may, I have a point of order I would like to bring up and I would like to come back to this particular point of discussion.

I made a motion when we were back on chapter 3 with regard to Indian records, on a point which Commissioner Borbridge brought up, and I think it is quite valid. I would like to change my motion and, of course, I never received a second on it.

I would like to change that motion to make it a request that the staff develop the type of demographics that may be necessary in order that we can provide credibility to those demographics.

Mr. ALEXANDER. Gathering procedures?

Commissioner WHITECROW. Right, gathering procedures and where it should be done. I would like to make that in the form of a recommendation, and hopefully get some concurrence on that recommendation from this Commission.

Chairman ABOUREZK. Did you change the motion?

Mr. MEEDS. It is a very general motion, why don't we just let the staff develop the recommendations and we will look at it.

Commissioner WHITECROW. That is fine. Does it need a second then?

Chairman ABOUREZK. I don't need a second.

Commissioner WHITECROW. Now, Mr. Chairman, if I might——

Chairman ABOUREZK. Jake, before you start, may I ask what are we going to have to decide to do in this series of meetings—what issues will we have to decide?

Mr. ALEXANDER. Today, in the trust chapter, we already had a vote last time on most of the basic principles in the trust chapter. What is new today is our revision of legal services in relation to the trust, which is to deal with our version of the trust council authority, of attorneys' fees.

The recommendations on pages 14 through 16 have been modified to control——

Chairman ABOUREZK. What chapter?

Mr. ALEXANDER. Chapter 4, the trust chapter, has been modified to conform to the vote that was taken in the January meeting. At the bottom of page 16D, legal representation for Indians, going through page 18, is new matter which has not been discussed here previously.

Mr. HALL. That is not quite correct.

Chairman ABOUREZK. Those are two issues we have to vote on.

Mr. ALEXANDER. You have to vote on the legal representation.

Mr. HALL. It starts at page 15, Indian trust rights, in that statement which came out of the last meeting.

Chairman ABOUREZK. Can we vote on that?

Mr. HALL. You voted on it in concept, yes, but you have not seen it in this form.

Mr. ALEXANDER. This reflects the vote that was taken.

Chairman ABOUREZK. Well, that looks accurate according to the way we voted last time.

The reason I am asking this; I have been missing votes over in the Senate, one about every half hour. Even though I am not running again, it still makes me nervous to miss votes, and there are some very important issues to be decided.

Mr. MEEDS. I would be delighted to vote your proxy, Mr. Chairman.

Chairman ABOUREZK. In all conscience I ought to get over and do that. Lloyd says he can stay and chair the meeting until 4 p.m., then he has to go, but I think you ought to run later. We have to resume our session at 10 tomorrow morning, and Lloyd will be here to start it out. I will come in late, at 10:30 or 11 myself.

The reason I am asking these questions, you will not have a quorum to vote unless we, at least, have two more congressional members, because five is not enough for a quorum.

What is it, seven?

Commissioner DIAL. Six.

Chairman ABOUREZK. Six is a quorum. If you have one congressional member, that is a quorum, but at 4 o'clock you will lose all of the congressional members. Are there any votes that cannot wait until tomorrow?

Mr. ALEXANDER. We should have sufficient time tomorrow.

Chairman ABOUREZK. And what other issues will we have to take up tomorrow?

Mr. ALEXANDER. The only other materials currently available are three portions of the social services chapter, a very brief section on child placement, a fairly extensive section on health, and a fairly extensive textural section on education.

Chairman ABOUREZK. Are there any major issues about to be decided today?

Mr. ALEXANDER. I would think so, yes.

Chairman ABOUREZK. Can you keep that discussion going today at some length and get everybody's mind worked out, with the staff and the Commission, and then we can run through it fairly rapidly tomorrow?

Would that be satisfactory?

Mr. HALL. Do you have to leave right now, Mr. Chairman?

Chairman ABOUREZK. Yes, I have to go, we are doing the Senate reorganization, and not only am I missing votes but, I am afraid someone will make an attack on the Indian Affairs Committee. It is sitting there untouched so far. Maybe I am better off if I stay away.

But I think it is important that I get over there, for a number of reasons.

Mr. HALL. We should proceed with discussion of the trust this afternoon.

Chairman ABOUREZK. Proceed with any discussions that you can today.

Mr. MEEDS. We can even have our votes. I expect to get beaten, but I expect for the record we could have some votes on some of this stuff on trusts.

Mr. TAYLOR. Tomorrow morning?

Mr. MEEDS. No; we can have it this afternoon. As long as I am here we can have a quorum.

Chairman ABOUREZK. What if you swing three of these people here, and then you can?

Mr. MEEDS. Do you think that is going to happen? [Laughter.]

Chairman ABOUREZK. Well, there is a possibility.

Commissioner BORBRIDGE. Mr. Chairman, if I might comment, I was going to say Congressman Meeds, that I think it is well and good that Indian members may come down on one side of the question. As commissioners we are likely to come down in a variety of ways.

But, very much to the point, if I felt I could persuade one of the congressional members, and get that congressional member on the record on a vote, I would prefer to do that. I think that it would be real important to the vote and the record.

That is why I think the more congressional people we can have here, the chairman or Mr. Yates or whoever, the better I really think it is quite important to where we come out on our Commission proceedings.

Chairman ABOUREZK. I agree with that.

Commissioner WHITECROW. Mr. Chairman, I would like to comment on that particular point. I have stated many times around the country that I feel confident that within this Commission we can win the battle, but without the congressional support we can lose the war in the Congress.

Mr. MEEDS. Why don't I do just this then, Mr. Chairman, why don't I just identify those areas on which I will have some reservations and indicate, either by vote or otherwise, and I will manifest that, at least, and I would ask the staff to line those issues up so we can start bringing them up tomorrow morning.

Please try to get the discussions, most of it, out of the way today, on concepts and so on, so that we won't have to discuss for too long a time tomorrow. I just want to admonish everybody that we are drawing to a close, this can't continue forever. I seem to say this every Commission meeting.

While all of us enjoy this debate and discussion, and it ought to be as open as possible, I think we ought to really try to discipline our own minds so that we can do it in as short a time as we possibly can. I think it would serve all of us very well to do that.

So I will see you tomorrow. I will designate Louis since he is sitting right next to me, when Lloyd leaves Louis will act as chairman.

Congressman MEEDS. Just for the staff and the other members of the Commission, as I indicated to you last time, I don't think there is any established general legal obligation requiring the United States to protect and enhance tribal self-government. I think it is excellent policy to do it but I don't think there is any established legal, overall, responsibility.

There is some responsibility under the Indian Reorganization Act. There are various acts which indicate that. I think it is good policy, but I don't think it is an established legal obligation.

If I understand No. 3 on page 15, I think I agree with it. Trust responsibility extends through the tribe to the Indian member, whether on or off the reservation.

If that means that he or she must be a member of a tribe, then I agree with it. Is that one——

Mr. HALL. That is correct, sir.

Mr. MEEDS. I would also hope that we would establish a method for recognition of more tribes. I recognize Mr. Dial's problem, and I certainly agree with that, and presently terminated tribes—their desire to be rerecognized—I would agree with that.

But as I said before, the responsibility runs to the tribe, through the tribe to the individual member.

Mr. HALL. The new material starts at the bottom of page 15, the Indian trust rights in that statement, which, as you will recall, we talked about providing a mechanism to get around the problem of condemnation.

The principal disagreement, as I recall the discussion in the last meeting, would appear in subsection C of page 16. Once that impact statement is prepared by the Federal agency pursuant to subsection

B, and submitted to Congress, before any Indian treaty rights or other trust rights can be infringed or abrogated, Congress has to affirmatively identify those rights and state that it is the intent of Congress to so abrogate or infringe.

Mr. MEEDS. Of course you will recall I disagreed with that entire procedure where it was essential to have congressional action.

Mr. HALL. As I recall you were leaning more toward the veto aspect, were you not, sir?

Mr. MEEDS. I was leaning to the aspect that the impact statement could be filed and the Congress itself would have to take affirmative action to——

Mr. HALL. As I recall the impact statement would be filed, and you were talking about a time limit in which Congress had to act to deny the agency the authority to take that action.

If it did not act within that time limit, the agency could go ahead.

Mr. MEEDS. I think that came up in a discussion as to how you work an impact statement, if you were going to have one. It seems to me I was voted down on the proposition that Congress had to take any action, that an executive agency or administrative agency could take condemnation action. That is the way I felt then and still feel.

If you are going to have an impact statement, then the question is whether Congress must take affirmative action or whether it should not take affirmative action. It would be my view that in absence of their doing so it would become effective because I think that is a simpler procedure.

Mr. HALL. I agree it is simpler. We felt, as you will recall, and I think the vote showed the added dignity and force that affirmative congressional action was important in this area.

Mr. MEEDS. I would say that what you have done here is a true representation of what I think the majority of the people agree to. I am not in agreement with it because I don't think that you even get to this step. But I am not going to make an issue of it.

Commissioner DEER. Why don't you think we will get to that step?

Mr. MEEDS. I say I don't get to that step because I don't think it is essential to get congressional consent for condemnation. I think that an executive agency, just like the Corps of Engineers, can condemn my land on the proper showing, so should the Corps of Engineers, a Federal instrumentality, be able to condemn Indian lands without congressional action.

I don't think your land is any different from my land in this respect. I know we have differences of opinion on that, but that is my view and it is still my view.

Commissioner WHITECROW. Let me give you an example, Congressman, about a situation that so happened in our area. Our tribe had a very small amount of land—523 acres—in one section. The State of Oklahoma intended to relocate a State highway and we had some, I will say, unscrupulous individuals serving in the State legislature who intended to benefit from this relocation of this highway.

They intended to come right down and split this individual Indian property owned by the tribe. It was in trust and the surveyors were already on the ground and I personally ordered them off the property. I was chairman of the tribe at the time.

We were able to change the direction of this highway and bring it down, our west boundary, rather than down through the center. They were not going to give us access to this highway at any location.

In ordering them off the property, and insofar as their being unable then to condemn this piece of property, we negotiated and brought them down the west boundary line, and we got access at the southwest corner. Eventually we brought in an EDA industrial park at the southwest corner and were able to survive and able to subsist.

This negotiation came about over a period of a year and a half. But had it not been for the tribal land not being eligible to be condemned, we would have lost.

Mr. MEEDS. This was a Federal agency?

Commissioner WHITECROW. Yes.

Mr. MEEDS. The gentleman out here can advise us of the present status of the law. My understanding that under the law presently, Federal agencies—executive agencies—can condemn tribal trust property. They have to join the Federal Government obviously as a trustee.

Mr. TAYLOR. I think there is a division of authority at the moment. The Seneca Reservation in New York was subject to condemnation by the Corps of Engineers under a general authorizing statute. The issue was raised in court at that time and at that time the court ruled there was no need for specific reference in the statute to authorize that condemnation.

On the other hand there are, I believe, just two decisions out of the 8th circuit involving the Missouri River Valley that have held to the contrary, and there are new cases pending where the issue is raised, which really impact, is the reason we were trying to get a legislative recommendation.

Mr. MEEDS. What we are doing here is making a recommendation in an area where there is no fixed rule.

Mr. TAYLOR. Right.

Mr. MEEDS. Do you have any disagreement with that, Mr. Martone?

Mr. MARTONE. Yes; but it goes to a broader picture. I would like to address some remarks to trust responsibility.

The report admits that the legal origins of that are murky and does not seek to define it, and I think that probably is the right tack to take. But the recommendations don't flow from the murky origins, it seems to me.

The relationship between the American Indian tribes in the United States is peculiar; it is in fact one of a kind. The courts have never been able to put a label on it so they have used their old common law labels. In relation to real property they have called it a trust relationship in which the U.S. Government has legal title and the Indian tribes have the equitable interest.

In relationship to other things they have called it a guardian-ward relationship. But when you start extending those terms to the whole panoply of Federal legislation concerning Indians, then you are confusing on the one hand vested legal rights, which may or may not require compensation upon their extinguishment, created by legislation or treaty probably enacted pursuant to the Congress' plenary power under article I, section 8 of the Constitution, and on the other

hand statutes designed to provide benefits to the Indians simply under Congress' spending power.

We were talking about the Johnson-O'Malley Act, and the General Allotment Act. Whether or not those acts relate to off-reservation Indians is a separate issue from whether or not those acts themselves are within the Federal trust responsibility.

It seems to me it is crucial to make that distinction because if you don't you are in a sense saying that if the Congress were to repeal the Johnson-O'Malley Act or the Indian Self Determination Act, or any other act, which through the spending power creates rights, there might be some legal duty to provide compensation.

What I am suggesting is that there are statutes which provide benefits which are quite different from legal duties which may or may not arise out of relationships that Indian tribes have by treaties or executive orders, or course of conduct.

Mr. MEEDS. Would you say the executive responsibility runs to tribal lands held in trust?

Mr. MARTONE. I have a problem. I have the same kind of definitional problem in terms of what trust responsibility means. It is, to me, unclear; it is as unclear to me what that means as nonfederally recognized Indians.

Quite honestly it seems to me that the Federal Government's responsibility is articulated through treaties, perhaps course of conduct, perhaps executive orders, or perhaps judicial decisions which may interpret those positive sources of legal rights.

Mr. MEEDS. And statutes.

Mr. MARTONE. When you go beyond that and somehow create out of whole cloth some common law duties, like the trust duty, and then attach that to all Federal Indian relationships and/or statutes, it seems to me you are going beyond the original intent then in terms of creating legal rights and legal duties.

The reason I raise that now is because on page 16, "action by Congress required," it says infringe any treaty rights, nontreaty rights which are protected by the trust responsibility.

Is the Indian Self-Determination Act a nontreaty right protected by the trust responsibility. My answer to that would be clearly no; but from the way we were talking about Johnson-O'Malley an hour ago, I would suspect that someone would say every time Congress enacts legislation, somehow we are within the Federal trust responsibility.

Trust responsibility, it seems to me as that term has been used in this report, goes to legal rights and duties as opposed to voluntary spending or the assumption by the Congress of duties.

In any event, until trust responsibility is defined with greater perceptual clarity, it seems to me that this would mean that every piece of Federal legislation relating to Indians would vest legal rights of a perpetual nature, perhaps.

For example, we all have a right to social security, but it is rather clear tomorrow Congress could repeal social security. There may be problems about distributing the existing trust assets but there is no doubt about the power of Congress to terminate a legislative program.

In any event I would like to hear someone tell me whether or not every piece of Federal legislation is part of this trust responsibility,

or whether that trust responsibility arises out of legal rights created by treaties or agreements with Indian tribes of the same order of validity and magnitude, as the kinds of rights we were talking about this morning, which would justify compensable interest in land——

Mr. HALL. Mr. Chairman, may I respond to that?

Mr. MEEDS. Please do.

Mr. HALL. If I could refer to page 12, what we were looking at before, another paragraph. The last paragraph of that page says the precise manner in which these applications are fulfilled, and what that is referring to is the paragraph with respect to services in Federal programs, Johnson-O'Malley, Snyder Act, et cetera.

The precise manner in which these applications are fulfilled in terms of magnitude and distribution may be changed by Congress as the relative strength and self-sufficiency of Indian tribes change. That language in subsection C, to which Mr. Martone referred, was purposely left flexible to allow for congressional changes in the future.

Continuing with that paragraph on page 12, the Federal duty to provide remains constant. That does not mean that Congress cannot eliminate a program. That is clearly not the case.

However, with respect to social services, you will recall there was so much case law with regard to when the program is set up and functioning, and one meets the eligibility requirements, he has a right to receive that service.

This is drawing a parallel to that kind of reasoning. Continuing on that paragraph on page 12, "furthermore the nature and degree of services provided by the Federal Government pursuant to the trust obligation is not altered by the services which Indians may receive on the same basis as other citizens," and that continues with the dual entitlement concept.

Subsection C is purposely left flexible. As we say, later on in the commentary, it is our judgment that it would be not only dangerous but perhaps foolish to define specifically exactly which services the trust obligation includes today for Indians. Over the year that may change, with a tribe putting itself in a position where it can assume the obligation for a great deal of programing, for example, and that does not allow for relieving the Federal Government of responsibility to provide that. You have locked both the tribe and the Federal Government into an untenable situation which neither may be able to live with years from now.

I was going to add one last caveat, if I might, with respect to Mr. Martone's comments. We identify in the report a primary and secondary responsibility with regard to the trust.

There is no question, I think, legally now, nor should there be any question with regard to protecting land, natural resources, tribal funds, water rights, and forestry—the other areas in which courts and Congress have identified as part of the trust. That is now, and should be made the primary responsibility of the Federal Government under the trust.

Mr. MEEDS. And the taking of that would be a compensable taking, would it not?

Mr. HALL. Under the fifth amendment.

Mr. MEEDS. Yes.

Mr. HALL. Yes; I think so.

Mr. MEEDS. What I am asking is: Do you feel that any taking on the part of the Federal Government as against an Indian tribe should be gaged in any different light than against any other citizen of the United States.

In other words, if the same test of compensableness applies to Indian tribal land or Indian tribal rights as to any citizen rights, do we have any disagreement on that?

Mr. HALL. Yes; we do. I think. I think that the thrust of this entire chapter is that Indian rights are certainly less susceptible to that taking, and that Congress and the Federal Government could take special care when there is going to be any taking or infringement.

That is the rationale, of course, behind the section in the recommendations with regard to extraordinary circumstances——

Mr. MEEDS. What is the legal basis for that?

Mr. HALL. I think it is what Mr. Taylor mentioned earlier, with regard to the split in case law, as to whether the executive branch can condemn lands without congressional approval or under a general grant of approval or not.

This selects that what we feel is policywise a strong position.

Mr. ALEXANDER. In addition to the fact that the Federal Government is operating as a trustee in this area, and it has a high duty of care to Indian tribes, they are assessing their Government, as we interpret that, beyond that we have to the land or other natural resources of an average citizen.

When you take Indian land it is very different than taking the land of myself, for example. I can go buy a new house someplace else, but that action with respect to me has nothing to do with political rights, ability to maintain tribal culture, other economic development in the tribal area, and so forth.

Mr. MEEDS. I would agree with you, that as a matter of policy we should do that. I agree, as I told you the other day, if there is a condemnation of Indian land, there ought to be a reattempt made to retain this land rather than money. I have no probelm with that.

But I don't know that that is a legal obligation. That is what I am saying.

Mr. ALEXANDER. There is one point that we must make. The position we take in many parts of Indian country would be viewed as a conservative position. Many people in Indian country would say flatly there should be no taking.

Mr. MEEDS. I understand that, that is the way this report first came out.

Mr. TAYLOR. Mr. Meeds, as I recall your question as phrased, it related to compensability and equated taking of Indian land to taking a non-Indian's land. I personally would not see a difference there. When the Government takes Indian land they are under the same duty to compensate that there would be toward an individual.

Mr. MEEDS. I probably did not articulate as I should have. What I was trying to ask Gil was: Is the question of what constitutes a taking under the fifth amendment different for Indian tribes than it is for any individual?

Mr. TAYLOR. That is the second element. There is a difference in the legal standards that the Government may be held to under this dividing authority that we are talking about. It arises out of rules of

statutory construction where the law standing rule of statutory construction is that a statute will be construed in such a manner as to not repeal by implication prior statutes or infringe on Indian treaties.

If that can be avoided, and it is covered by another rule of statutory construction that where it has ambiguities, it will be resolved in favor of Indians. What we have got going through these different case positions is really rules of statutory construction attempting to avoid unintentional abrogation of trust rights. As a matter of policy, as you point out, we are trying to recommend here that this be a codified position.

Commissioner WHITECROW. Mr. Chairman, if I may speak to this issue for just a moment, the same incident that I was referring to earlier, the status that they consider our lands in Oklahoma, the land that I was referring to was tribally owned land, and they could not condemn that.

The only aspect of condemnation we are referring to here is that land which is owned by the community, by the tribe, in communal ownership. I would like to ask this specific question.

How does the law apply to State owned land when we have a conflict such as the Corps of Engineers coming in to condemn State-owned land? What is the application of law there?

Mr. TAYLOR. Commissioner, I have not researched the subject but I would assume it would stand on the same basis of condemning fee patent land of the non-Indian. I doubt very much if the corps would have to come back to Congress for specific approval.

Commissioner WHITECROW. You don't think the State would stand on its back legs and fight this issue?

Mr. TAYLOR. I think they would immediately call up their Senators and Congressmen and probably get some actions going. But I don't think there would be a legal prohibition. That is an off-the-cuff statement.

Commissioner WHITECROW. The point I am trying to make is that I don't believe that we have a State in these United States that look at land the way a tribe looks at land, the way Indian people look at their land.

They look at land as the Mother Earth, the sustenance of life. It gives life with growth and minerals of that specific soil and it gives life and it takes life, and we live upon that land. That is where I think we need to have our whole point in contact with. We have morality issues here and we have philosophic issues involved.

If the American citizens would ever go back to the manner in dealing with our fellow human beings like the old Indian customers were in dealing with fellow human beings, that is an individual would wrong me, that individual then would devote his life to my service, to helping me, to laboring for me and to assist me, and this is not slavery.

It is because he wronged me morally or legally he wronged me, and we had very little detention. We had very little reason for penal institutions.

If our American citizens would once again come back to this kind of reality, we may not need all of these attorneys that we are developing around the Nation. I don't have anything against attorneys, but constantly we are coming back invariably to what are the legal issues involved in this report.

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I think this report should be valid in its historical and legal relationships. That to me, having the responsibility of representing Indian people, I think we need to speak to the issues of philosophy in this report. That morality in the report and most definitely those philosophies and those moralities involved in this report are not going to be politically popular.

It has been proven in the past that it is not politically popular. We have in this particular report generated, as I recall, an estimate of 50 percent of the total energy reserve of this Nation within those Indian lands. You can rest assured that we have legal eagles out there right now planning to assume control of those resources, and we have big money people out there ready to purchase, and any other manner, unscrupulous as it may be, to achieve control of those resources.

I look at trust responsibility as a responsibility of the Federal Government entering into a solid agreement with an Indian tribe, and fulfilling that obligation lock, stock, and barrel.

When I make a commitment to another man, I make that commitment and I live by that commitment. When a government makes a commitment to another government it makes a commitment and that commitment should be lived up to.

And in this particular case we have found those commitments have not been lived up to, those agreements have not been fulfilled.

I see this trust responsibility as the Government's obligation to fulfill those obligations, and to assure those obligations are met, whatever they may be. As legislation comes down the pike and changes, whatever those changes might be that have been negotiated, that have been worked with, that have been cussed and discussed, then it is the Federal Government's responsibility to its administrative arm, its executive branch, to fulfill the delivery of those services, and protect those services.

We have not allowed tribes the opportunity to develop and the law that created this particular Commission says that we have never seen Indian tribes work toward self-sufficiency. Unless we knock the barriers down, and unless we let those Indian tribal governments have the opportunity to make their own mistakes and grow, we are not going to see self-sufficiencies, for tribes again.

We are whistling into the wind, and spitting into the ocean, if we think that we are going to, if we keep providing all of these barriers to development. We must remove those barriers and we must go on past court cases.

I am not an attorney, I am a worse layman than John is, but as I understand the Supreme Court cases, they stand behind these cases and they stand behind those obligations. This is the Federal Government's responsibility to fulfill those obligations.

As the Federal Government cannot fulfill our obligations, we are in trouble and there is no way we will become a world leader in any stretch of the imagination unless we can first of all clean up our mess and fulfill the obligations that we have incurred. The obligation is also on Indian tribes, tribal government has the obligation of fulfilling its responsibility.

Indeed the Indian people themselves, members of those tribes, will make those assurances because they must remove those tribal leaders that are not capable. We must provide these tribal governments the

opportunity to develop and we must be sure that in the trust relationship delivery that the Federal Government, through its administrative arm, fulfills that responsibility, and that every employee in the system works toward fulfilling that responsibility.

I have found in the past that Federal employees don't have the slightest concept of what their job responsibility is and these are GS–13's, 14's, and 15's that I have talked with that do not have the slightest idea about the history of their particular position. And it is a philosophical position, a legal position, a position that is designed to help people develop.

Trust responsibility, to me, that is what it is. Mr. Martone, I hope you agree with me. If you don't it won't do you any good.

Mr. MARTONE. I agree that the United States should fulfill its responsibilities. Where we perhaps disagree is in the definition of what those responsibilities are.

Commissioner WHITECROW. Spelled out in the treaty.

Mr. MARTONE. I have no problem with that.

Commissioner WHITECROW. Spelled out in other legislation.

Mr. MARTONE. Not necessarily.

Mr. MEEDS. Any further statements or questions with regard to the trust responsibility section?

Mr. FUNKE. You asked, Congressman Meeds, about whether there was a legal obligation with regard to condemnation. I think it could be put on the plane of a legal obligation because the treaties guarantee certain reservation boundaries and certain parcels of land to the tribes.

If that land is dissipated through condemnation, that is a violation of the trust, and it also leads to the dissipation of tribal culture and the reservation boundaries are fixed and once that land is gone the reservation can't be picked up from New Mexico and placed in Colorado.

Mr. TAYLOR. I might make one further comment on the section. It is rather ironic, Commissioner Whitecrow, that you make this analogy between great nations and great men. In fact, a Supreme Court justice in a dissenting opinion on a subject related to this used that analogy. I think it was Justice Holmes in *Tuscarora Nation* v. *The Federal Power Commission*, That was his concluding remark as a dissenter: "That great nations, like great men, should live up to their obligations."

Interestingly enough, in that very case, what the Supreme Court decided was that through a licensing process, I believe to the State of New York, condemnation of Indian lands had been authorized, even though there were no records in the licensing procedure or statutory authority to the Indian lands.

That is the opinion that Holmes dissented from with his reference to great nations and great men. It is Holmes' position that we are here attempting to codify.

Commissioner BORBRIDGE. My comment is directed at our attorneys, and obviously we have a full team present. I am sympathetic to your understandable desire to argue what the law is, both pro and con, and to compare notes on the interpretation of from whence a particular Indian right may have been derived. That is all well and good, but I want to admonish all of you that what we are concerned about is not solely relative to interpretation of the rights, whether they are derived from national policy as it has been enunciated and prac-

ticed, or whether we are talking about Supreme Court decisions or statutes or treaties.

What we are talking about in addition to what the rights are, and from whence they have been derived, is related to where this Commission wants to go. In my view, the Commission is not seeking to try, as a matter of policy to reduce the extent of rights solely to a technical enumeration.

It may question the nature of these rights, it may seek to present a broad spectrum of views as part of the investigation. But must go far beyond that question. The matter of the status of the law as you gentlemen seek to interpret it is, for this Commission, just the beginning point.

This Commission, as I said in the past, is serving as a catalyst to try to bring to bear the highest standards of conduct to which we feel this Nation can address itself with respect to its unique and special relationship with the native Americans who are the aboriginal occupants of this Nation.

Thus, the work that is being done from a legal perspective is very helpful and very necessary because it certainly goes to the root of the strength and nature of the Indian position.

Do the Indians come before the Congress and finally move toward recommendations as supplicants with no basis of rights in law or in policy, or do they come as a mixture, some of which rights we recognize clearly, as being derived from and based on law, some of which are in a somewhat murky category and, as to others, we are not certain as to where their rights to certain services may have been derived.

Regardless of this mixed bag, our purpose, as I see it, is to take all of this and ask what is the highest standard we can apply. If anyone is to act as a conscience to the Nation, and really to provide something constructive, setting out a recommended path as to where we can go from here, in looking at the tommorrow for all Indians, then I suggest it is not only the responsibility of this Commission, but I suggest as each of our attorneys without exception advances various ideas, I want to hear where we end up under the premises that are advanced.

I don't want, as a layman, to be left with the thought that it is up to me to try to interpret where the varying interpretations of the cases may take us. Please remember that by contributing to a discussion of those cases, you influence the formulation of a desirable direction as to where we may want to end up.

That is why I appreciate the tremendous input that we have had. I think we have one of the most outstanding teams, Mr. Chairman, that I have ever watched in action. But I think in their eagerness to have at one another, they should keep in mind that there are overall considerations of policy that determine where we might end up.

Thank you.

Mr. MEEDS. Very good. You have dragged us back to the track of establishing policy.

Are there other questions or statements with regard to trust responsibility? I would just quickly indicate that I disagree with C on page 16 for reasons heretofore noted.

No. 1, the infringement without extraordinary circumstances for compelling national interests or otherwise. That is obviously a component of any kind of taking in the first instance.

National use must be established before there can be a condemnation so I see no reason for setting it out, especially in the sense it has appeared lastly, in that, pursuant to the congressional act, as I indicated earlier I think it can be done by executive act as well.

Are there any other suggestions, statements, agreements, or disagreements?

Mr. HALL. Mr. Chairman, subsection D on page 16 does not continue with the policy considerations but it does set out to some extent organization and procedure pursuant to our meeting the last time. While it does not recommend a rejuvenation of the Indian trust authority concept:

It contemplates that concept in terms of independent legal representation, but it places that litigating office in a Department of Indian Affairs. It presupposes a recommendation for a Department of Indian Affairs which will follow in subsequent chapters.

It would contemplate primary litigation authority within the Federal establishment for protecting and bringing suit on behalf of Indians to protect their trust rights.

It would contemplate a removal of the trust services being supplied by the Office of Trust Services currently in the Bureau of Indian Affairs, and it would contemplate removal of the Division of Indian Affairs in the Solicitor's Office new Department of Indian Affairs.

It would not relieve Justice Department of all responsibilities for representing Indians. It would, however, place the primary responsibility for that litigation authority in the new Department of Indian Affairs.

Mr. ALEXANDER. Justice could be requested to represent them on a specific case; also provided is the ability for the Office of General Counsel, or whatever we are calling it, to contract out for legal services.

Mr. MEEDS. Mr. Martone, is there anything that is contained in the rest of this trust relationship section with which you have violent disagreement?

Mr. MARTONE. I am not violent on anything. I will refer the Commission to page 18. In paragraph 4 it suggests that where there is a conflict of interest between an individual Indian and a tribe involving trust issues, the Office shall represent the tribe and shall engage private counsel to represent the individual at Government expense.

I gather that would contemplate the situation in which a duly authorized tribal council enters into a lease with a mineral exploration company, the minority in the tribe is aggrieved of that tribal action. This position would require the United States to not only pay for its expenses in representing itself and the tribe's expenses in representing the tribe, but also the expenses and burden of litigation of the minority of the tribe which lost in the tribal council.

I just wonder how far the trust obligation goes. If it goes to individual Indians through tribes: Does it not end after a duly constituted tribal council renders its managerial/governmental decision about how that tribe is going to proceed.

That is one aspect.

Mr. MEEDS. What is the rationale for the Federal Government paying three sides of a law suit.

Mr. HALL. Simply that there are controversies that have arisen with legitimate, brought in good faith, suits in which an individual

Indian's trust interest and trust property may be conflicting where they are inconsistent with that of the tribe.

Oftentimes the individual trust interest will suffer purely and solely because there is presently nowhere to seek counsel to represent his side. That is all this does.

It is a recognition that oftentimes trust rights suffer because there is not money to hire counsel.

Mr. MEEDS. I don't know that this is terribly important, but with all of the effort that has been put forward here to establish the tribal entity and to make it viable, it would seem to me that you would have the obligation of providing counsel by the tribal entity.

I really feel that way.

Mr. HALL. You mean representing the tribe and not representing the individual?

Mr. MEEDS. And the individual.

Mr. HALL. The office representing both, even if they are conflicting?

Mr. MEEDS. No; where the conflict between the individual Indian and the tribe involving trust issues, where tribes should furnish counsel, not only for itself but for the individual. I am for this largely, not to the extent some of you people are, but making them viable entities and suddenly you have this very viable entity who supposedly can tax people and a lot of other things. And you suddenly say when it gets in conflict with one of its own citizens, then the Federal Government is supposed to come in and provide funds for all of the parties.

Mr. HALL. It is not in every controversy, it would only be when a trust interest would be involved. It would not be if the individual were suing the counsel, for example, or bringing suit in a Federal court for violation of the Indian Civil Rights Act, for example, over some sort of election dispute.

It would not contemplate that at all. It would contemplate, however, when trust issues are involved because the Federal Government now has the obligation to represent the individual and the tribe both when there is a trust issue or when there is trust property involved.

What happens is that Justice and Interior will represent one or the other and the opposition frequently suffers because there is not funding available to present his or her case.

I don't think it happens that often now. To be honest with you, I have no figures. Perhaps somebody else would have an idea of the frequency with which this arises. I would think it would be very seldom.

Mr. MEEDS. Do you have further comments, Mr. Martone?

Mr. MARTONE. Yes; continuing with page 18, paragraph 5: It recommends that the United States waive its sovereign immunity for all actions brought against it by tribal Indians in trust matters.

That has appeal to the extent that if the United States has obligations it ought to be responsible in terms of fulfilling those obligations, and in the absence of such a waiver there would be no forum within which to hear the action.

Similarly, if the tribe has obligations under its treaties and leases and contracts then it, too, ought to waive its immunity or the Congress should waive it for it, so that there would be a forum within which those aggrieved by tribal action can assure that the tribe's conduct is within the rule of law.

As it stands now there are really, in the absence of constitutional claims under the Indian Civil Rights Act, very few ways in which

private citizens or governments can assert rights against an Indian tribe.

It results, partially, because there are inadequate forums, partially because even when you get to the only available forum there would be the defense of sovereign immunity. States don't have jurisdiction, generally, over actions in which an Indian tribe is a party defendant.

Public Law 83–280 States, since that statute talks about litigation in which Indians in contrast to tribes are parties, similarly have no jurisdiction. Federal courts have no jurisdiction because there is no diversity of citizenship and rarely do these cases involve a Federal question.

In tribal court, even if a non-Indian entity were to be satisfied with that forum in a given context the tribe could raise the defense of sovereign immunity.

So most contracts or leases as entered into with Indian tribes are inherently unenforceable. There are many imaginative ways that imaginative counsel have sought to get around that problem. Some have sought easements over the land instead of leases through the Secretary of the Interior.

Some have suggested that one would sue a tribal official as opposed to the tribe, just as one now sues Federal and State officials as opposed to the State and Federal Government.

But the fact of the matter remains that that is an area ripe for congressional action. If in fact the United States is going to waive its immunity, it seems to me the corollary responsibility is that it must waive the tribes' as well.

Mr. TAYLOR. I would most violently disagree with the concept of the Federal Government waiving the immunity of an Indian tribe. Mr. Martone's comments do have bearing, however, on credit problems under tribal governments. But this is a very old rule of law that we have used in buying used cars and all kinds of things.

The contracts you are talking about with tribes would be of rather substantial nature, and we call it caveat emptor. Any person of substance dealing with substantive contracts with tribes could certainly attempt to get the tribe to waive its immunity for suit in the event of breaches of those contracts.

The problem that has come to light is an occasional inability of the tribe to waive its immunity when it chose to do so in order to get credit. We have talked about amending section 81 and section 177, I believe it is, of title 25, dealing with the secretarial power in trust matters to permit tribes to overrule his position so that they could go ahead and utilize trust resources.

I think what you can build in there is a qualification, let's say, of the power of a tribe as a government to waive its own immunity in those situations where it so chooses.

But, the 50 States of this country have sovereign immunity, municipalities created under that State legislature and the countries have sovereign immunity. It is up to those governments to determine when they are going to waive the immunity and when they are not going to waive it.

The Federal Government has that power and has exercised it in enactment of Federal tort claims. But it is absurd to say that this Federal Government, through blanket legislation, can come in and try to waive the immunity of the tribes.

I would take violent exception to the concept.

Mr. ALEXANDER. The other part of that is not pertinent to the discussion of the United States waiving its sovereign immunity in trust matters. My question basically is: Do you have a problem with the United States waiving its sovereign immunity in actions brought by or under the auspices of the Office of Trust Rights Protection when it is representing Indians in trust matters? That is the question.

Mr. MEEDS. That is the real question. Mr. Martone's discussion goes to a much larger matter——

Mr. ALEXANDER. A separate issue.

Mr. MEEDS. Of waiver of immunity. In addition to who can waive the immunity, what immunity should be waived, and so on. It might be a question we should confront someplace but this is a narrow issue here.

Mr. MARTONE. But it does arise even in this narrow context. For example, if the Indian minority who loses in a tribal council is going to be hired counsel at Government expense, presumably it would assert those rights against some entity.

As it stands now it could not bring suit against the tribe. I don't know how it is consistent to provide counsel for Indian minorities who lose in the tribal council without at the same time giving him a forum in which to assert his claims.

Mr. MEEDS. Maybe it would be good for limited purposes here.

Mr. TAYLOR. I think when the tribe goes into court for this trust counsel it is in fact waiving its immunity. It is submitting itself to the jurisdiction of a court.

A case in point, a factual base that may be relevant here, would be the *Hollow Breast* case which was just up before the Supreme Court. I think it was where the Crow Tribe was claiming all subsurface mineral rights despite the fact tlat the reservation had been allotted an opponent—there was an individual trust allotted member of the tribe who was claiming the subsurface rights of his allotment as individual assets.

There would be legal conflict where either the tribe or individual took it into court. I think it was the tribe that took it into court. There was a waiver of immunity there implied by having taken it into the court. I really don't think there is a genuine problem.

Mr. MEEDS. Any other questions or suggestions?

Do you have further observations, Mr. Martone, on this subject, or any of the staff?

Mr. MARTONE. I have just one final one. On page 21 it said—this goes back to my comments this morning—to a considerable extent these principles are merely congressional recognition of existing law. I think that statement is, on its face, inaccurate.

Mr. MEEDS. Where is that? Which paragraph?

Mr. ALEXANDER. Right after footnote 40 on page 21.

Mr. MARTONE. I think most of the issues raised in this chapter are lively issues of current concern. They are issues that are litigated to a great extent. They are the very issues of law and policy that this Commission wants to find answers for.

To say that these recommendations or that these principles, which may very well be policy commitments of the majority, that is one

thing. But to say that these principles and statements are merely a congressional recognition of existing law is simply inaccurate.

Mr. MEEDS. I would agree with that.

Mr. HALL. You will recall I read that sentence earlier on to show that the comments here in the commentary was not intended to be an absolute statement of the law, that there was some question.

It seems to me what you are arguing with is the word considerable. I don't see how you could not suggest that there is legal support——

Mr. ALEXANDER. Considerable legal support.

M. HALL. Well, it is our position that it has great legal support, as a matter of fact. What you are really talking about, it seems to me, is that adjective, whether it should be "considerable" or "some" or "a lot" or "a little." I think it is the position of the majority, at least of the staff, that "considerable" is more accurate than "a little."

Mr. ALEXANDER. It is even a conservative term.

Mr. HALL. Right.

Mr. MEEDS. I would personally prefer to see it, "to some extent some of these principles." That would be my own preference on that.

Anything further?

Very well, what is the next subject matter?

[Whereupon, a brief recess was taken.]

Mr. MEEDS. We are recessed until 10 o'clock tomorrow morning.

[Whereupon, at 3:50 p.m., the hearing was recessed, to reconvene at 10 a.m. on Feb. 5, 1977.]

MEETINGS OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION

SATURDAY, FEBRUARY 5, 1977

AMERICAN INDIAN POLICY REVIEW COMMISSION,

Washington, D.C.

The Commission met, pursuant to recess, at 10:10 am., in room 1324, Longworth House Office Building, Congressman Lloyd Meeds, vice chairman of the Commission, presiding.

Present: Senator James Abourezk, chairman; Congressmen Lloyd Meeds, vice chairman, and Sidney R. Yates; Commissioners Adolph L. Dial, John Borbridge, Louis R. Bruce, Ada Deer, and Jake Whitecrow.

Staff present: Ernest L. Stevens, staff director; Paul Alexander; Fred Martone; Peter Taylor; Patricia Zell; Alice Clark; Karl Funke; Gilbert Hall; Ray Goetting; and Laurel Beedon.

Mr. MEEDS. The American Indian Policy Review Commission will be in session for further efforts on our schedule.

Could I just go off the schedule for a moment and ask the staff: Ernie, what is the proposal for future timetable?

Could you lay that out for us right now?

Mr. STEVENS. That is one of the things that we need to settle. We are saying that there is a possibility of a tentative meeting. We had February 24, 25, and 26 for meetings.

Mr. MEEDS. What days of the week are those?

Mr. STEVENS. Thursday, Friday, and Saturday. While we are talking about those. I want to put in a word for Congressman Yates who brought it to my attention.

It would be a continuation of what we are doing now.

Mr. MEEDS. That would be chapter 6, chapter 7, and review of the first draft of chapters 3, 8, 9, 10, 11, 12, and 13.

Mr. STEVENS. We have part of chapter 8, social services, right now.

Mr. MEEDS. What is chapter 3?

Mr. ALEXANDER. Three is the demographic chapter that we went over yesterday. We will make the changes that you agreed in, the additional recommendations, and we would come back with that as the final.

It is a two-step process.

Mr. MEEDS. Are we past tribal governments?

Mr. STEVENS. No.

Mr. ALEXANDER. Tribal government will come up on February 24 or 25. We were not ready for it in a revision for this meeting.

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Mr. MEEDS. Which chapter is that?

Mr. ALEXANDER. Chapter 5.

Mr. MEEDS. On the schedule that I have there is nothing about that.

Mr. STEVENS. No.

Mr. MEEDS. Trust relationships: Are we through with that now pretty much?

Mr. ALEXANDER. Pretty much. According to what you said yesterday about going through and then coming back on the legal section of it, perhaps we can vote on that later today.

Mr. STEVENS. What I wanted to say, sir, was that where I put in "tentative meeting," it appears to me that to come back at these sections, we have not gone through the first part on everything from six up.

We haven't even talked about it. What I think should happen is that we should go on through this, and then finish up at a meeting following the 24th.

I don't believe we can finish all that work at that next meeting. That is why I put in there "tentative meeting."

I don't think it can be done.

Mr. MEEDS. You are going to distribute 1,000 copies. Will that be printed?

Mr. STEVENS. It will be printed. We will use the Government Printing Office. Probably, it will be typed, maybe even single-spaced on both sides.

Mr. ALEXANDER. Offset printing, which is much quicker.

Mr. STEVENS. Yes. On eight and a half by eleven. What we would have to do, if we had another meeting in there, and I propose the possibility for one, we would have to adjust our dates and hold onto the end date, of course, of May 15. And then get another meeting in there. There is not much room, but we can make it.

Mr. MEEDS. There is not much time to get a draft of the tentative final report.

Mr. STEVENS. But to get it into the kind of condition that we need—I don't believe in 3 days that we can go through it. What has been happening to us right along, and rightfully so, the interest in the legal portions of the thing has taken up most of the time.

As a result of that, we have not even had a first run at the rest of it. What I suggest we do is go through it, finish up tribal government around the 24th, hold on this trust business until the last meeting, and then go on with all the rest of the chapters through the end.

Then if we can squeeze in another meeting, then we can fine tune it for printing for this distribution.

Mr. MEEDS. I think probably we can finish the trust thing today.

Commissioner DIAL. Mr. Chairman, according to this schedule, you have no scheduled meeting after the 24th, 25th and 26th, right, Ernie, for the Commission?

Mr. STEVENS. There is a tentative meeting in early May. In other words, you have to have another meeting to go over——

Commissioner DIAL. What I say, you have no scheduled meeting.

Mr. STEVENS. We do so, on May 2 and 3.

Commissioner DIAL. OK.

Mr. MEEDS. I am seeking guidance here from other Commissioners, Would it be possible to have a meeting some time in early March to look at the draft tentative final report?

Commissioner BRUCE. And eliminate the 24th?

Mr. MEEDS. No, no. We have to have the meeting February 24 and 25, but I don't see any use in meeting before you have something final that you are going to send out to present to us after that time. But I think it is important to do that before you do send anything out.

Commissioner BORBRIDGE. Your suggestion is an early March meeting, Mr. Chairman?

Mr. MEEDS. Yes. Maybe March 2 that you have there.

Mr. STEVENS. Then we could go through this and then we can come back immediately. If we have this meeting the week of February 24 to 26—whatever date you set—then after the comments on that meeting, we can pretty well have a final draft to present to you.

Then you can spend 2 days going over it and even voting, if necessary, and that would give us the direction to finalize it and get it ready for printing.

Commissioner DIAL. I wonder, on that last meeting, if a date after the fifth would work just as well. That comes right in my final examinations, near the second.

Mr. MEEDS. Could we cover the first part of it first, Commissioner Dial? The March meeting or late February meeting—whatever it turns out to be.

Would a meeting on March 2 throw any changes in the tentative draft? Would that still give you time to get your distribution of 1,000 copies on the ninth?

Mr. STEVENS. I am not sure if we can get it on the ninth, but we can get it fairly close. We can, providing we have 30 days prior to April 15, that would be the thing.

Commissioner DEER. I think several of us have a problem with meeting on Wednesday. It would be extremely difficult for me to meet on Wednesday.

It is the day my class meets, and Commissioner Dial has a teaching commitment.

Commissioner DIAL. No, I don't have one, but I will go along with you. I know your problem.

Mr. STEVENS. Mr. Chairman, none of these dates are even proposed. These dates were set to give the Commission a sense of how we have to schedule it.

You have to set the dates. In other words, Wednesday is not a proposal. We are just saying approximately March 2.

Mr. MEEDS. How about the third and fourth? Would that be acceptable?

Commissioner DEER. Yes.

Mr. MEEDS. Let's tentatively set it for the 4th.

Commissioner DIAL. That is Friday.

Mr. MEEDS. I will be unable to be here February 26.

Mr. STEVENS. Sir, if we could set that—that, too, is just a date. If the Commission could give us a date in that week.

Mr. MEEDS. Are there any objections to the 24th, 25th, and 26th?

Mr. YATES. I will probably object. Meetings are always held on weekends, and I want to go to Chicago.

Mr. MEEDS. The gentleman probably reserves the right to object. [Laughter.] That is Thursday, Friday, and Saturday.

Commissioner DEER. If we could discipline ourselves to have some time schedule, why couldn't we have a meeting for 2 days? You said you could not meet on the 26th right?

Mr. MEEDS. That is right. But I might have to leave early on the 25th.

Mr. STEVENS. You could do it if we started early and worked late both days, like 9 a.m. to 6 p.m., or something.

Mr. YATES. I have my Appropriations Committee, and I have a time limit to get my bill out for the budget. My hearings start on the 16th.

Mr. MEEDS. What time would be the best for you, Sid?

Mr. YATES. I am going to be gone all the way through.

Mr. MEEDS. How about the weekends?

Mr. YATES. Well, Saturdays and Sundays are the only times we could meet, but I don't think those are very convenient times for everybody.

I would like to have a little time to prepare for my hearings.

Mr. MEEDS. Maybe we ought to just go ahead and stay with the dates.

Mr. YATES. Why don't we stay with the dates, and if I can make them, well and good.

Mr. MEEDS. Is there any other problem with that? Let's pretty much plan to do that, then. Then, March 4, that would be all right for you; would it not, Sidney? That is Friday, or will you be having hearings that day?

Mr. YATES. March 4, no, I don't have any scheduled. But what happens is that I leave dates open in case we don't finish. But set your meeting for that date.

Mr. MEEDS. Tentatively is March 4 all right, then?

Mr. YATES. On Thursday I have the Alaska Land Use Commission.

Mr. MEEDS. I don't know about going into the rest of this at this time in the absence of the chairman. Commissioner Dial, I would like to be able to respond to your question about May 2 and 3 at this time, but I don't know that we should go beyond this without the chairman being present.

Commissioner DIAL. That is all right.

Mr. MEEDS. We can take it up when he arrives.

Commissioner DIAL. I will be here. I have never missed a meeting, and don't intend to miss one now.

Commissioner WHITECROW. It seems to me you missed your final graduation, last year.

Commissioner DIAL. Yes; I did.

Mr. MEEDS. The clerk will call the roll to establish a quorum.

CLERK. Commissioner Borbridge.

Commissioner BORBRIDGE. Here.

CLERK. Commissioner Bruce.

Commissioner BRUCE. Here.

CLERK. Commissioner Deer.

Commissioner DEER. Here.

CLERK. Commissioner Dial.

Commissioner DIAL. Here.
CLERK. Senator Hatfield.
[No response.]
CLERK. Congressman Meeds.
Mr. MEEDS. Here.
CLERK. Senator Metcalf.
[No response.]
CLERK. Commissioner Whitecrow.
Commissioner WHITECROW. Here.
CLERK. Congressman Yates.
Mr. YATES. Here.
CLERK. Senator Abourezk.
[No response.]
CLERK. There are seven present.

Mr. MEEDS. Thank you. A quorum is present. The first order of business today is chapter 8, social services. Who is presenting social services?

Paul, are you?

Mr. ALEXANDER. A group of us. I will start.

Mr. MEEDS. All introduce yourself for the record, please.

Ms. CLARK. Alice Clark.

Ms. ZELL. Patricia Zell.

Mr. ALEXANDER. The chapter on social services has currently, in draft, three sections. One on child placement, one on health services, and one on education.

What is missing is a section on State welfare programs and a section on corrections. Those are in the works.

Our anticipation is that we will not have detailed sections on those, but rather problem identification, and maybe some general recommendations. We discussed that previously.

On child placement, the first section, the recommendations are on page 11 of the section. The recommendations that we make track essentially a bill introduced by Senator Abourezk last August.

They are basically taken from task force 4, which was submitted last July. What they provide for, essentially, is notice to tribes when the issue of custody of an Indian child is being questioned, a right of intervention in the proceedings, funding to tribes to upgrade and and establish social service mechanism, foster care homes, and so forth. And some detailed recommendations to the Secretary of the Interior to coordinate a more comprehensive recordkeeping system.

We collected a substantial amount of data in 18 States, where there are significant Indian populations, on foster care and adoption issues.

The statistics were difficult to collect, and the States which participated in the collection oftentimes were surprised by what they turned in, in terms of the disproportionate number of Indian children removed into foster care settings and adoption settings.

The statistic that is missing most frequently is where the children are placed. Where we do have statistics, the indication is anywhere from 80 to 90 percent of the children are placed in non-Indian homes or institutions, generally acknowledged as a very significant and substantial problem.

There are some constructive efforts being undertaken by some private and State agencies to get at this problem.

They have not been overwhelmingly successful.

Mr. YATES. How many children are involved?

Mr. ALEXANDER. Thousands.

Mr. YATES. Did you say thousands?

Mr. ALEXANDER. Oh, yes. In most States you are talking about anywhere from 10 to 15 percent of all Indian children being situated in foster care or adoption.

It is a significant problem. We are talking about thousands of children.

Mr. YATES. What are the causes of that, Paul? Is that poverty, primarily?

Mr. ALEXANDER. There are a number of causes, and there are almost two levels to the problem. The first level is that there are significant, as you know, poverty problems, alcoholism problems, and so on. Poverty problems generally bring social service agencies into the setting. There may be a valid judgment made that a child needs to be removed from its natural environment.

That judgment may be invalid, based on a number of imposed social values. But even if the judgment is valid, that the child needs to be removed, what happens to the child frequently is that the normal instrumentalities in the Indian community, like the extended family, generally are not eligible for adoption or foster care under AID standards, square footage of rooms, heating, and so on.

So the child is removed. We have to focus that there are two levels. There is significant abuse in the decisionmaking process as to what is an adequate environment.

The people who work in this field generally are social workers, most of them are untrained. Untrained means that they don't have graduate training. Even those who do have graduate training, like lawyers, learn absolutely nothing about Indians in graduate school. There are some exceptions, like Ada Deer's class. But there is a lot of imposition of culturally and socially inappropriate standards. The case law in this area is classic examples of horror stories, of assumptions that Indian people are somehow inherently unfit parents.

The one that strikes me: There is a case coming out of west Texas where an Indian woman was passing through a town, pregnant, and had her child in the local hospital. The social agency or the hospital social services agency, not knowing this person at all, the person having been in town for a day, instituted procedures to remove the child at birth, under the theory that an unwed Indian mother was an unfit parent.

When the case got to court the pants were beaten off of the social service agency, but it gives you an indication of some of the thinking that goes on.

There is a brief summary in the chapter of a much larger statistical survey that we took, and it starts at page 4 in the chapter. This will give you some gross idea of the statistics. They vary. For example, in the State of Maine, which we talked about yesterday, where the local community in the last 5 years has been fighting this issue, one out of every 13 Indian children is in foster care. That is about 8 percent of the population.

Mr. YATES. You look at these statistics and I question the use of your term "thousands". One out of 13 Indian children. How many Indian children are there in Maine?

Mr. ALEXANDER. This is a typed summary, and we have all the statistics here.

Mr. YATES. Another question comes to mind. Isn't this problem essentially one of State laws?

Mr. ALEXANDER. It is a multiple problem. In the reservation area tribal courts and social service agencies which have jurisdiction in tribal courts are aggressively moving to reassert this jurisdiction.

Our view is that it is exclusive jurisdiction, and that that should be recognized. But there is such mobility in the Indian community that because a tribal court in Montana determines the custody of a child——

Mr. YATES. Isn't that something where you and Mr. Martone are going to have some difficulties?

Mr. ALEXANDER. I don't know. Are we going to have difficulties here, Fred?

Mr. YATES. On the question of jurisdiction.

Mr. MARTONE. I have no difficulty with the question of the exclusive jurisdiction of an Indian tribe over domestic relations matters of reservation Indians arising on the reservation.

In fact, the Supreme Court held last term in the *Fisher* case that was to the exclusion of State jurisdiction.

We will have problems in any setting other than that limited one. That is to say where a reservation child leaves the reservation and is living within a State.

Then it seems clear to me that State courts have jurisdiction over that. I am not even sure that you disagree with me on that.

Mr. ALEXANDER. We are not disagreeing, when they have a question of domicile in bordertown areas. But we are not proposing to have the Navajo court have jurisdiction over a child in Minneapolis-St. Paul.

What we are saying is that that tribe should be notified and have ability to come into that court and represent its interest as in a sense guardian of that child.

In a flourish of rhetoric, I will admit that we do say—I am not sure it is rhetoric—the most valuable resource of a tribe is its people, and it is the one that it has the most fundamental interest in protecting.

What we are saying, that conditioned Federal funding to most social service agencies, which is how most of our welfare programs are run in this country, that a notice be provided, a right of intervention be provided in the proceedings.

That is not a shifting of jurisdiction. It is giving the tribe an ability to find out what is happening to their children, wherever they are, and be able to say, "We can set up this system for our child in the reservation or in another family in Minneapolis-St. Paul" and give the court some viable alternatives, other than the ones normally presented to it in child proceedings.

That is what we are suggesting.

Commissioner WHITECROW. I have a question along that line. Paul, do you give a tribal government an opportunity to have input in this

kind of situation? Do you not see that as being a great potential of imposition on a tribe, on its tribal government?

I know most reservation tribes have more money than nonreservation tribes.

Mr. ALEXANDER. We are also talking about providing resource in the child development area, and foster care area.

I would simply say this to you: In the cases I know about where the tribes have been able to locate what has been happening to their children, tribal court judges, from the Blackfeet in Montana, traveled to the courts in Maryland to present their case last year, to make sure that that child's custody, which had been determined by their courts, would be respected by the Maryland courts.

The Maryland courts, as a matter of comedy, basically last year refused to take jurisdiction over a child custody case, where it had originally been decided in Montana, and the child had been removed to Baltimore, Md.

Mr. YATES. Was this a broken family?

Mr. ALEXANDER. In that particular case there was a situation where the parents were involved in an auto accident. The father was killed and the mother was hospitalized for an extended period.

A VISTA couple, who were working on the reservation, were granted temporary 1-year custody by the tribal court, with the mother's consent.

They removed the child from the reservation and attempted to institute adoption proceedings in Maryland. The Maryland courts refused to take jurisdiction.

Mr. YATES. Is that a common practice? Where an out-of-State or out-of-reservation court refuses to take jurisdiction?

Mr. ALEXANDER. It has happened several times.

Congressman YATES. How many times has this come up?

Mr. ALEXANDER. In the case law, in the sense of reported cases, it has come up about a half-dozen times in the court of appeals and so on. But it has come up in lower court areas, a substantial number of times.

We work with the Association on American Indians with this out of New York. They have two full-time staff people who practically do nothing else but fight child custody issues around the country.

Speaking with a lawyer out of Salt Lake City several months ago, she spends, I would say, 60 percent of her practice fighting child custody issues, with various Mormon agencies in the Utah area.

Mr. YATES. How do they arise, Paul? How do the children get off the reservation? Is it because of the causes you have mentioned, the poverty and alcoholism, or something like that?

A social worker comes in and designates an out-of-reservation agency as being the foster parent?

Mr. ALEXANDER. Yes. In some of the situations people on the reservations are on State welfare, as they are eligible for. The whole welfare area, as you are probably aware, there is a great deal of ignorance as to what people's rights are.

A parent is probably the most intimidated person in the proceeding, and what a social worker generally attempts to do is to get a consent kind of thing.

"You let me take your child for several years. You sign these papers. It is best for the child. You will keep getting your money" and so on and so forth.

What we see is really the tip of the iceberg, because a lot of this happens without it ever being contested. We know the horror stories. We know the people who get into the hospitals in Salt Lake City and they are behind on their bill for maternity care, and the hospital says, "We will forget the bill on maternity care, if you sign the child over for adoption."

In some quarters of this country in the last decade, it is somehow considered chic to adopt an Indian child.

There are social service agencies that have specialized in the adoption and placement of Indian children. It is actually international, because it takes in Canada, the ARENA (Adoption Resource Exchange of North America) operation which specializes in "problem children."

Mr. YATES. What do you want the Commission to do? What do you want the U.S. Government to do? As I indicated, it is a question of local jurisdiction primarily; is it not?

How do you want the Federal Government to act toward it?

Mr. ALEXANDER. We want the Federal Government to support the tribal development of social service apparatus, so that many of these problems can be handled in the tribal setting.

We want the tribe of origin to have a right of notice of any proceedings outside of its jurisdiction, and a right to enter into that proceeding.

We want to have adequate statistics collected by the Federal Government, so that we can have an ongoing notion of what this problem is.

Mr. TAYLOR. Mr. Yates, I think what Paul is saying is that we are seeking Federal legislation on the subject.

I think what you are asking is: What legal authority the Federal Government would have to legislate on this issue.

Mr. YATES. Does the Federal Government have that authority now under the trust relationship?

Mr. TAYLOR. Yes; it does.

Mr. YATES. What is missing, then? Adequate appropriations for the purpose?

Mr. TAYLOR. No; I think legislation.

Mr. ALEXANDER. Specific legislation along these principles.

Mr. TAYLOR. Imposing a Federal solution to the jurisdictional question. I think we are in agreement with Fred on this, that the case law has already said within a tribal boundary that the tribal court has jurisdiction.

But when an Indian goes off the reservation he comes under the State jurisdiction. But he still is a, pardon the term, ward Indian, and the Federal Government has for two centuries legislated with respect to Indians no matter where they are in the country.

A classic example is prohibiting the sale of liquor to an Indian. There is much case law that supports the power of the Government to extend its jurisdiction over its wards, no matter where they are within the country.

What we are asking here is Federal legislation that would——

Mr. YATES. You really feel you need additional legislation?

Mr. TAYLOR. Yes; I think it is clearly necessary, and I am not sure that this would be a very controversial point for State authorities either.

Mr. MEEDS. As bad as my State's record is in some of its dealings with Indians, especially the fisheries question, in this field it is pretty good.

Coming out of one of the counties I represent, my county chairman's wife is a social worker on the reservation, who has developed a system for keeping Indian children adopted on the reservations' rather than farming them out to the local citizenry.

As Paul points out, it was chic at one time. It is not anymore.

Mr. ALEXANDER. It may still be in New York or someplace.

[Laughter.]

Mr. MEEDS. He is exactly right. I think probably the States would not frown upon some kind of Federal legislation in this area, particularly conferring jurisdiction on courts and requiring notice to tribes of origin, things like that.

I think those are good points.

Mr. YATES. What has the BIA been doing? Is there anything for the BIA to do here? Apparently it has done nothing.

Mr. ALEXANDER. The BIA is as culpable in this situation as any other participant.

Mr. YATES. Having said that: What do you want them to do?

Mr. ALEXANDER. I want them to be replaced in social service situations by the tribal operation. That is the focus of direct funding to tribes.

Mr. YATES. How much money is involved?

Mr. ALEXANDER. I could not give you an estimate of that. But a lot of that could be done under Public Law 93–638 at the present time.

Commissioner WHITECROW. As it is at the present time the only ways the tribes could assume that responsibility would be contracting social services under 638; is that not correct?

Mr. ALEXANDER. Yes.

Mr. STEVENS. I would like to, at least, take issue on that. I have been doing a special study on Public Law 93–638 for the Commission, and hopefully for the Indian subcommittees and the committees.

Remember, at one of the previous meetings some of us said that the Bureau and the Indian Health Service was sabotaging 638, which Congressman Meeds and others expressed some surprise.

Since then, on specific documentation, we are looking at 638. Things like the Indian Health Service transferring funds from the management and training parts of the act into salary adjustments.

Mr. YATES. I am getting telegrams on that. Would this be Indian Health Service or BIA?

Mr. STEVENS. Both. We are talking about social services. Ray and I have been looking at this.

The whole business of contracting in some respects, in 638, for instance CETA, which I don't consider to be any kind of perfect vehicle, but yet in the legislation they provide that people get money to do things.

In this particular case, manpower training, I pose that there is a possibility that the whole business of this Commission proposing that we continue this contracting mess, I think we ought to take a fundamental departure from that and take a look at it.

Is there a possibility the Congress can get these moneys to Indian tribes?

In our Federal administration chapter we are going to advance the whole proposition that Congress should, as a matter of policy, take the view that Indian appropriations belong to Indians.

That is not the proposition now. When you talk of Federal employees, it is BIA money, Indian health money, Federal service money, Government money, taxpayers' money, anything but Indian money.

What I am saying is that we ought to take a look at the delivery mechanism. They are taking the Public Law 93–638 funds in the Bureau of Indian Affairs and they have now successfully turned it into a BIA program.

They have established a self-determination office. I pose the further assumption that they are the least suited to have a self-determination office.

What they need is an Indian——

Mr. MEEDS. Direct conflict of interest.

Mr. STEVENS. Yes, sir. Anyway, they have provided for 82 positions, headed up by somebody who is the head of self-determination, and so on.

In the regulations in 638 there are conflicts. In section 104 there are provisions for tribes being able to increase their management capability, the kind of things they need in order to take charge of things.

What the Bureau does in their regulations, they let that, and then as a further part in the regulations, in order to get these grants through a contract, which has become a contract mechanism, you must have those capabilities to start with.

Mr. YATES. Are the tribes ready for that?

Mr. STEVENS. They are ready to receive grants——

Mr. YATES. I am sure they are ready to receive the money. But are they able to expend the money in a way that would benefit all the members of the tribes?

Mr. STEVENS. I think that the laws and regulations should provide that they handle them properly. In other words, give them guidelines for doing that and then let them do that.

Mr. YATES. It is an interesting concept, Ernie, but how do you protect against misuse of the funds?

Mr. STEVENS. I think the same ways that you provide that for any other municipality, or anybody who receives a grant.

If they are in violation, you take your usual procedures. The whole business of learning how to conduct your own government is to let you do it. I think that has got to be done.

In terms of accountability, the very mechanisms that are required by our tribes—in other words, to be accountable, the Bureau and Indian Health Service make flagrant violations of.

They commingle funds, and if one of our chairmen did that they would hang him up by the thumbs. Yet they can commingle funds. They do not account for their money.

One of the area offices in the BIA won't even report in on their accountability. They don't even account for their money.

Mr. YATES. Where is this?

Mr. STEVENS. Alaska. In other words, we have to have auditors in.

Mr. MEEDS. Is that the Juneau office?

[Laughter.]

Mr. STEVENS. I am saying, just as a thought-provoking kind of thing, why don't we consider taking a look? Why don't we not just accept the fact that we should give something to the Bureau or your superduper agency won't do it either, unless Congress provides that this money gets to those people.

Mr. ALEXANDER. The recommendation here is direct to the tribes. To answer your question, I did a quick run on the compilation of statistics, and the statistical survey is about 80 printed pages: 19,000 combined foster care and adopted Indian children. The best estimate is based on data for the last 3 years.

Mr. MEEDS. 19,000 Indian children adopted in the last 3 years?

Mr. ALEXANDER. Adopted is a cumulative figure, foster care is an average rate.

Mr. MEEDS. How much would that be average annual——

Mr. ALEXANDER. The combined figure is 19,000 for the 3 years. I would have to go through and pull out the individual statistics. I could run them again.

Commissioner DEER. Mr. Chairman, I wanted to support the recommendations made on social services here, and just cite a couple of examples from my own experience in my tribe.

One of my own relatives was adopted out, and opening up the rolls, some of my other relatives came to me and what they wanted to know was how they could trace this youngster, because they thought it was very important that this youngster be enrolled.

At this particular point there is no way that this can be done. For all intents and purposes, that youngster is lost and is deprived of his heritage, as well as monetary benefits and services.

Second, I think it is time that we give tribes options in all of these areas. We have differing capabilities in tribal governments in terms of administering these funds, getting grants, accountability.

Some tribes would certainly be ready for this and be able to administer social service programs and carry out very competently the contracting and grant mechanisms and others would not.

I think the principle we should follow here is allowing tribes to have the option, and then develop the capability to do this.

Mr. MEEDS. Further comments? Mr. Martone, do you have any comments on this?

Mr. MARTONE. I don't.

Mr. MEEDS. Commissioner Bruce?

Commissioner BRUCE. For the record I would like to talk about this adoption thing a little bit from my own personal experience as a trustee of over my years of knowledge of Indian affairs what was the best institute, let's call it institute in the country for helping families to place Indian children.

I served on the board of the Thomas Indian School in Gowanda, N.Y. for 21 years.

We had a relationship with the Seneca Nation there, worked with the Seneca Tribe. All the tribes of New York State sent needy children, from large families or broken homes, to the Thomas Indian School.

From there, through the trustees and the director, we helped Indians through the welfare department in the State of New York to either go back to the reservation or to go on for further training—vocational or otherwise.

Meantime, on the campus and in that school we tried to give them all kinds of experience so that they would have vocational skills.

I know the family background of almost every one of about 500 kids who were there—where they came from, what their family experience was.

Because of our interest, Mrs. Bruce and I brought up on our farm 17 of these so-called orphans. Took them into our home, did not adopt them. Three of them we did.

We sent them on and helped them get scholarships. Some of them married in our small community. We now have 26 Indian kids in our school system.

But along the way we helped them get started.

And I just felt that we have to help them adjust to a non-Indian community. This was not a school that prevented kids from talking Indian.

If they wanted to talk Indian, they could do that. Way back there in the thirties, long before some of you were born, we tried to do this, because of criticism against some of the other BIA Indian schools.

This school was supported by the State of New York but was originally started by the Friends.

All of a sudden one day the Governor called me and said. "We are closing the school within 3 months and all of these students have to be sent back home or placed elsewhere."

I ran up and down the country roads, trying to get people to support it, because the idea was good, it was sensible. I saw the results of the training that those kids had received at that school.

Some of us took those children into our homes and we see the results. Bob Hoag's mother, who is chairman of the Senecas now, was on the board at the same time I was. Bob is chairman of the Seneca Council today, and also received some training there. I am just pointing this out, because when I was Commissioner I tried to bring about some changee. It was almost impossible, because I knew what the problems were in a large bureaucracy like BIA.

I think the adoption thing has to be watched. One thing we made clear. That young person was taken off those rolls, because he was sent away.

It was not an assimilation system. We made sure that he or she stayed on those rolls, that he or she was in contact with the family, if they had one, and I would say 40 percent of those kids had no families, and that is why some of us came in and acted as their parents.

I think that school, in itself, should have been continued, but rather the State said, "We will have no segregated schools, and that is why this has to be torn away".

They would rather have them in schools elsewhere in the country. I just want that to be for the record, because I think the exprieneces

we had there ought to be used in whatever we are trying to come up with in the way of a recommendation.

Mr. ALEXANDER. While you were explaining your roll there, I quickly ran the number of children in foster care, based on the best available statistics for 18 States for the last annual year, and it is 6,000 children.

The other 13,000 I was referring to is a cumulative total of children of minor age that have been adopted out.

I would say from the indications where we have statistics, better than 90 percent of those children are in non-Indian homes or institutions.

Could I make one further comment? In going through this, E, which is the financial resources for the maintenance of foster care homes and institutions, I think in the final draft the language of that section should be broadened to child-related social care institutions and so on.

I think that language is somewhat too limiting. It is too restrictive, and should be broadened. Tribally-operated apparatus for the welfare of children, or what have you.

We will work out some broader language. The scope of the problem is broader than the narrow language we use there.

As I say, the recommendations here are in the draft of the legislation Senator Abourezk introduced in August and presumably that will be reintroduced.

Mr. MEEDS. Further questions in the field of child welfare?

Mr. MARTONE. I would like to make one comment, at least to clear it for the record, my comments regarding my feelings about the recommendation.

I said earlier that recommendation 1–A, which says that the issue of custody of an Indian child domiciled on a reservation is within the exclusive jurisdiction of the tribal court—as I read the *Fisher* decision, that is true.

What I failed to say, and perhaps at least for the record it should be clear, that is true in non-Public Law 83–280 States, such as Arizona.

The *Fisher* case was in Montana, which does not have Public Law 83–280, with some limited statutory exception. So, to the extent that recommendation 1–A applies even to Public Law 83–280 States, that kind of special legislation, presumably, would have an impact on the Public Law 83–280 jurisdiction of the State courts in those areas, where this kind of recommendation would have to be consistent with whatever this Commission's recommendations are with respect to Public Law 83–280.

Which, as I gather, suggests that it be abandoned. In any event, there has to be some consistency there.

Mr. MEEDS. With regard to Public Law 83–280, abrogation is the word of the day.

Mr. ALEXANDER. Flexible retrocession.

[Laughter.]

Mr. ALEXANDER. Just a point of clarification, because there has been some confusion on the impact of Public Law 83–280.

That is our position when we talk about private government, and we will get into this in some detail, just so the record is clear on where it is raised.

Our view is that the jurisdiction of tribal courts in Public Law 83-280 States remains. At best the States received some concurrent grant of jurisdiction, that which the Federal Government had assumed.

The next section is health, and Dr. Zell will lead off on health.

Dr. ZELL. This chapter is a first draft, and was authored by Alice Clark.

Mr. MEEDS. Are we not going to cover education? Or are you taking health first?

Mr. ALEXANDER. In the order of things, health is the next portion, and then we are going to cover education.

Mr. MEEDS. Fine.

Mr. ALEXANDER. Peter raised a point on the child welfare section—whether we needed a vote or not. I gather there was a unanimous sense from the Commission to proceed as we had recommended, and that there was no problem with the recommendations?

Mr. YATES. Is your sense the same as a vote?

Mr. ALEXANDER. No; but if you gentlemen would like to vote, I would like a vote just for the record.

Mr. YATES. I think we ought to approve it, Mr. Chairman.

Mr. MEEDS. The question is: Will the Commission approve the recommendations of the staff with regard to the field of welfare.

All those in favor signify by saying aye.

[Chorus of ayes.]

Mr. MEEDS. Opposed; no.

[No response.]

Mr. MEEDS. The ayes have it. The section is adopted.

Mr. ALEXANDER. Thank you. Pat?

Dr. ZELL. This chapter is a first draft, and it was prepared by Alice Clark. If the Commissioners recall, when they discussed the health chapter in November, we acknowledged the fact that the health task force, in preparing its report, had submitted its report prior to the passing of the Indian Health Care Improvement Act by the Congress, and that the information presented at that time did not contain an analysis of the Indian Health Care Improvement Act and its impact on Indian health needs.

First I would like to go through briefly the areas that we have isolated as those areas that the Indian Health Care Improvement Act does not address.

That is in terms of the environment, the Indian Health Care Improvement Act addresses the sanitation facilities only.

That is, Indian Health Service has responsibility to construct sanitation facilities. It neglects, however, to address the issues of nutrition, and transportation for Indians living in isolated and rural parts of the reservation who are unable to get to the IHS center, wherever it may be.

It fails to address housing conditions, albeit part of which are the responsibility of HUD. But it fails to address the issue of the crowded conditions and the severe shortage of housing.

I would just like to point that out in terms of the environment. The act provides for further staffing of IHS, but addresses only the future needs.

There is some severe oversight in addressing immediate staff shortages, and what has to be done in the interim.

There seems to be no plan to recruit or maintain health professionals now working for IHS. There is, seemingly, a gap. What will be done for Indian health between the time that IHS gets fully staffed, assuming that the Indian Health Care Improvement Act is fully funded that the Commission feels, should be addressed.

Mr. MEEDS. Dr. Zell, would you like to take your recommendations and suggest what they are, and the rationale for them very quickly?

Or would you rather proceed in some other fashion?

Dr. ZELL. In terms of these recommendations I would say that they could be consolidated into three or four major points.

I would like to just introduce those rather than read through these, or highlight these. Perhaps in my perspective I would have highlighted other problems than may have been presented here.

Finally, in terms of the Indian Health Care Improvement Act, the funding as it now stands is in fixed categories, and one of the big problems that we identified with IHS is that their budget systems are so allocated down the line that by the time the money gets down to the service unit, there is no flexibility as to how to spend that money.

Obviously, the needs will be different in Arizona than they would in South Dakota or than they would be in Alaska. We feel it is critically important that there be some flexibility here, so you don't get five X-ray machines where you need five nurses.

Chairman ABOUREZK. Would you say that the new act that was passed deprives the IHS of that flexibility?

Dr. ZELL. Insofar as the funding being in fixed categories, it does not allow for flexibility.

Chairman ABOUREZK. How would you change the law in that respect?

Dr. ZELL. I would defer to my legal colleagues.

Chairman ABOUREZK. I would suggest you tell us how the law should be changed and make a specific recommendation, if the Commission thinks that is the best way to do it.

I, personally, think they ought to be allowed more flexibility. What is the Commission's comments on that?

Mr. MEEDS. Mr. Chairman, as the prime sponsor of the Indian Health Care Improvement Act of 1976, I think it is a fine act.

[Laughter.]

Mr. ALEXANDER. In fact, the chapter does say it is the most comprehensive approach ever taken by Congress on health care, and so on.

Chairman ABOUREZK. We will adopt that language, and then also the changes necessary.

[Laughter.]

Mr. MEEDS. It sounds like a Lebanese.

[Laughter.]

Chairman ABOUREZK. If you don't have it right now, would you provide that as a recommendation? If the Commission does not object to it, specific language—not that specific, but specifically directed, as far as the report is concerned, to how that flexibility can be achieved.

In other words, the law has to be amended or whatever.

Mr. ALEXANDER. At this point the recommendation is very general, which is what Pat was referring to in the sense that this is a first runthrough.

We are going to rework a lot of these recommendations in terms of the points that you were just making.

Dr. ZELL. I would say finally that the most critical issue in the Indian Health Care Improvement Act is acknowledged, I think, by many Indian people as being a major step forward.

And, again, if it is funded appropriately and to its fullest, we hope to see great improvement. The one area, however, that was not addressed in the act, and I don't know whether that was the appropriate place to address it, but the whole issue of IHS being the primary provider of health services to Indians, and that situation—first of all, the role of IHS in being the primary provider or not being is not clear.

I don't think Congress has ever said. As you may know, what happens is that State health care facilities frequently deny health services to Indian people, on the basis that there is an IHS facility in the neighborhood down the road—that may be 50 or 100 miles away.

But what they are saying is, "You've got your own hospital. We don't need to treat you." Obviously, in emergency situations, and a lot of us only go to the hospital in emergency situations, to be denied services because, after all, Indians are still citizens, and the fact that they are denied services seems to stem from this ambiguity.

It would seem to me that it would be appropriate for this Commission and a recommendation down the line that Congress would endorse the principle very strongly that health services should not be denied to Indian people on any basis.

Whether that would further entail a distinction that IHS is the primary provider and no other health units are responsible for providing health services to Indians, I think, would probably be a mistake, and probably would not benefit the majority of Indian people.

But congressional endorsement that services not be denied would seem to me to be a very important step for Congress to take.

Chairman ABOUREZK. I think we can do that very easily, in the sense of Congress resolution or in some statute.

But don't you think we ought to go beyond that and provide in specific instances that the Indian Health Service, in any area where there is an Indian population, should be required by Congress to notify hospitals and doctors in that area of that fact?

That in an emergency situation the local hospital should not deny Indians access to that kind of medical care.

Understandably, if you are going to have a gallstone operation, that is something you can put off down the road and go to the Indian facility.

But emergencies are a different thing, and I think there ought to be more specific language than just the sense of a Congress resolution.

Second, are you going to put in a resolution that funding for contract health care be dramatically increased?

Dr. ZELL. We have some points of disagreement on that. It is my strong feeling that until the time we see IHS in the best of all possible worlds deliver maximum health care services to Indians, that contract health care should be more adequately funded in the interim, to make sure that all Indians are receiving semiadequate health care.

There are others among the staff who feel that the contract care movement should be moved away from, and that IHS should be forced to provide direct care.

Chairman ABOUREZK. How can they do that in an urban area, for example? Let's not talk about Los Angeles or Chicago.

Let's talk about Rapid City, S. Dak., where there are probably 3,000 Sioux Indians living. They do have an outpatient unit there, but there are still some cases where that outpatient unit cannot handle Indian health care.

It has to be done on a contract basis. How do you say right now, without going through all the other motions of building new IHS hospitals and clinics and so on, how do you say that those Sioux Indian people will be taken care of with regard to health care?

Mr. ALEXANDER. In the revision of this there is going to be an interim recommendation for increased contracting care.

The problem with the way it was drafted is that a contracting point is a long-term point, which conceives of IHS performing adequately in most places.

Given the distance IHS has to go before it can get to that point, there has to be expanded contract work, at least in the interim, and in the kind of situations you were addressing.

We agree with that.

Chairman ABOUREZK. I don't disagree with that at all. I think you ought to have an interim. You ought to think about having something like a medicare card for Indian people who come off the reservation as far as contract health care is concerned, along with the increased funding.

John Borbridge?

Commissioner BORBRIDGE. I, too, share the same concern that with the development of the contract medical care it is entirely possible that the rural areas which are unable to attract, on their own, competent medical people will be in a very difficult position, even with the increase in contract medical care moneys.

The other concern that I have, relates to the usual negotiations in contract medical care, where the clientele is largely an Indian tribe or a mixture of several Indian tribes.

When there are just one or two doctors available, then there really is not much of an opportunity to negotiate and to, I suppose, express a desire for one doctor who is presumbaly better, more sensitive and more cooperative than another.

But is it ever anticipated in some of the contract medical care negotiations that the tribes in any way would be involved or have some impact on the negotiations?

I have observed specific instances in which doctors have been recipients of contract medical care funds, and while being the beneficiaries of such funds had at the same time been somewhat insensitive to some of the specific concerns of either a tribe or several tribes.

Do you see any involvement of the Indian tribes or groups in negotiations?

Dr. ZELL. Absolutely. That would be one of the major points that we want to pin down all of these recommendations on, and that is the tribal input. Certainly in areas, for instance, in New Mexico.

The right of the Indian people to determine who those contract health care providers will be is very important. That they, as much as possible, identify those facilities and those physicians, nurses, community health representatives, social workers, whom they are

most comfortable with, relating to in the interim of, hopefully, that someday we will have Indian staff hospitals and Indian social workers, community health representatives, physicians, et cetera.

So I think that is very important.

Commissioner BORBRIDGE. Would you say the tendency now in IHS is, with respect to contract medical care, that tribes or representatives of various tribes who are the recipients of medical care, have not generally been involved in the contract medical care negotiations?

Dr. ZELL. I would think so. I would not want to make an unfair statement. However, when we interviewed the IHS officials, when they went over our final recommendations, this was for the first time around in November, it was clear that they were not anxious to use their moneys for contract care.

There was reluctance to put that money outside of IHS. I would think, with that reluctance, there would be an associated reluctance to involve Indian people in the process.

Commissioner BORBRIDGE. My observation has been that with respect to direct delivery of health services, that IHS has generally sought to implement a program of Indian involvement.

I could not assess how successful that matter has been. The matter of Indian involvement has somewhat been minimized, with respect to contract medical care delivery of services. And this is why I make the point. I want to again reemphasize the original concern that I had expressed with respect to contract medical care, and that is, if there is a large increase in delivery of services through contract medical care, again, I want to emphasize the concern I have for the many rural areas, where there are presently no doctors or other medical people available to provide such services, or where attracting such personnel may be difficult.

Thus, the availability of contract medical care funds would not completely fill the need, in effect, in rural areas. It would seem to me that, as far as IHS moving out of the provision of direct services, there are areas of the country that will pretty much continue to need direct services.

Dr. ZELL. Yes; I am sorry if I gave the impression that IHS wanted to move out of direct care, because, indeed, they want to remain in direct care.

But the service unit flexibility that we were talking about before in terms of funding deals directly with this in terms of the contract medical care, and in terms of the lack of flexibility to conduct outreach programs that would reach people in rural areas.

And that is what I was implying.

Mr. YATES. I want to ask some questions when Jake is through.

Commissioner WHITECROW. Mr. Chairman, this funding of health to Indians away from their home area has been a point of concern that I have had for several years, and have had several meetings with regard to this, these past 3 or 4 years.

The funding apparatus and delivery of health care service to Indians on their reservation areas, when we take a look at self-determination and take a look at the money availability, how we deliver service to an Indian.

I think we get back, again, to the same question: "Who is an Indian and how do we determine who an Indian is?" We have an awful lot of Indian people out here who say that they are Indian, and they have no method of identifying themselves right at that particular time.

Therefore, they have a lot of facilities that deny them service, just right from the start. In other words, they have to have some document with them that specifies that they are an Indian, and that they meet those eligibility criteria.

Very few people will carry an 8½ by 11 sheet of paper folded up in their billfold for very long without it being dilapidated.

These people who are denied service—and we are talking about Chicago and Rapid City, S. Dak. I would like to talk also about the urban Indians in Oklahoma City and Tulsa, which have about 100,000 to 150,000 Indians in these cities, who are currently denied contract health care service.

They can go to the Indian Health Service facilities and receive direct care at that particular facility. But they are unable to receive any contract health care in the event they have serious long-term disabilities.

How do you deliver health care under a contract health care program to a tribal citizen, if you do not do it through the tribe?

The concern that I have, Mr. Yates, is: Are we really providing health care service to those Indians who are tribal citizens?

Mr. YATES. Jake, I was going to ask the same question. When Jim Abourezk raised the question about Rapid City, S. Dak., the thought occurred to me—well, the Ruehr's case comes to mind.

Is Rapid City so close to the reservation that there is no question that the Indians in Rapid City are entitled to the delivery of health care? If they are, as of what point, as of what distance does the Ruehr's case no longer apply?

Is Chicago, Ill., too far from the Menominee, for example, in Wisconsin, so that the Menominee cannot be taken care of in Chicago, Ill.?

Or the Minnesota Indian, or the other Indians? It is more than a question of who is an Indian. It is a question of once finding out that a person is an Indian and he lives in Chicago, who, then, takes care of him?

As I understand what you are suggesting, Jake, that money should go to the Menominee and the Menominee should have the responsibility of taking care of a Menominee in the City of Chicago.

But you would then put the responsibility upon the Menominee in Chicago to make sure that he is provided with the health care out of funds that the tribe receives.

Is that what I understand your point to be?

Commissioner WHITECROW. What I am suggesting here is that the tribe itself, the money be provided to a tribe for their travel members who are away, something like a medicaid program, third-party reimbursement, for example.

Mr. YATES. You mean a Menominee Indian could go to the Passavan Hospital in Chicago, and that bill would be paid by the Menominee Tribe in the same way as Blue Cross?

Commissioner WHITECROW. Right. This would create new job opportunities at the reservation.

Mr. YATES. The thought occurs to me: Why don't you just give them Blue Cross-Blue Shield health care, and why go back to the Menominee Tribe?

Commissioner WHITECROW. That would be possible. The tribe could, if it desired, buy a health insurance policy to cover their Indians away from the reservation.

Mr. MEEDS. That is in the Indian Health Improvement Act this year, off-reservation treatment under medicare and under medicaid.

Mr. YATES. Where do the tribes come into that law?

Mr. MEEDS. It is not administered by tribes. It is administered by the local health delivery system to an off-reservation Indian who cannot get to an Indian Health Service facility.

Mr. YATES. Let's take Chicago, for example. We do have urban clinics there. But take another city that does not have an Indian Health Service urban clinic.

Mr. MEEDS. You are talking about two things. Urban clinics are another thing.

Mr. YATES. I know. I want to put the urban clinic away, because we are talking about, presumably, an Indian in a city that has an Indian urban clinic who can go to the urban clinic and get taken care of.

We are talking about another case, an Indian who has a Blue Cross-Blue Shield certificate. He can go to any other hospital and get care under the proposal that you have just described; is that correct?

Mr. MEEDS. I think there are a number of situations.

Mr. YATES. Which would be better, actually, than having an Indian urban clinic. He can go to any of the hospitals that exist.

Mr. MEEDS. If the gentleman will yield. Let's take clinics first. Clinics are for some very specific purposes, primarily for outreach.

Indians in urban settings don't know often where the facilities are or where they should be going. Secondly, they are hassled by local health delivery systems.

They are told that they are Indians and they should go on to an IHS facility, and they just have a bad time relating to the health delivery systems in urban settings.

So the first function of the urban clinic is to provide information and provide outreach for urban Indians. The second function is to provide minor services. And the third function is to refer them to local health care delivery systems, where they will qualify, and it is something that the clinic can handle.

That reimbursement, through medicare, medicaid—I don't know if there is any reimbursement for other than medicare-medicaid.

Dr. ZELL. No; there isn't.

Mr. MEEDS. Actually, you have most situations taken care of by these things. You have the situation where it is a minor thing, to be taken care of by the clinic.

Two, where it is a matter of referral, that is done. If they qualify, then they are referred to an IHS facility, and any major matter is taken care of there.

Mr. YATES. Your thesis is that you do need the urban clinics, if for no other reason than an information center for Indians to receive the information which will permit them to obtain health care?

Mr. MEEDS. Right, and for minor health care, yes.

Mr. YATES. Are you going to put clinics into every city in the country?

Mr. MEEDS. I don't know that that is necessary. I think probably they will establish clinics in most areas where there is a significant Indian population.

All that I am saying is, however, subject to the caveat I made here earlier and agreed with Jake on, that you have to identify people who are members of the class of people to whom, either treaty, statutory, or judicial decision kinds of obligations arise.

I think there are a great number of people being treated, being referred in urban clinics today, who would not classify, who have really given up their right to tribal membership, or who are not members of tribes.

Mr. YATES. That is the second point I raised with Jake. Who is an Indian? The first point is: What is the statutory authority presently for the urban clinics?

Mr. MEEDS. The Indian Health Care Improvement Act.

Mr. YATES. Is that on the books now?

Chairman ABOUREZK. Yes.

Mr. YATES. When was it passed?

Chairman ABOUREZK. Last year.

Mr. YATES. So we have the authority. What is the authorized expenditure; do you remember?

Chairman ABOUREZK. About $2 billion, but it includes medical schools——

Mr. MEEDS. For a 3-year period it is about $459 million. It is a 7-year bill, and we have to reappropriate, or reauthorize appropriations after the first 3 years.

But I don't recall how much of that is in urban clinics.

Mr. YATES. Does anyone know the answer to that question?

Mr. MEEDS. I would say it is probably under $10 million.

Mr. ALEXANDER. $5 million for the first year, $10 million for the second, $15 million for the third.

Mr. MEEDS. It is a total of $30 million for 3 years.

Mr. YATES. It won't pay for very much.

Mr. MEEDS. I was just giving the gentleman my own experience. We have a very fine outreach clinic in Seattle. It was one of the first, and it is one of the best.

My recollection is that the total expenditures there are $400,000 a year——

Mr. YATES. Much more than that. Off the record.

[Discussion off the record.]

Mr. ALEXANDER. Most of the urban centers——

Commissioner WHITECROW. Might I add another point here? Those urban clinic directors that I have spoken with—most of them are underfunded. They need additional funds with which to operate.

They are out hustling every nickel they can get. They are not totally funded. They could provide additional services with third-party reimbursement, say, for these minor services that are provided.

By funneling this money through the tribe, the tribe itself could reimburse that particular clinic operation and provide the money necessary to maintain it.

This is why I, personally, feel that the contract health care money should be funneled through the tribe, allowing the tribe to take care of private citizens away from home.

Congressman MEEDS. Would the gentleman yield? I agree that there should be some kind of provision for urban Indians who are members of tribes, and who would qualify, in Indian Health Service facilities. But I would personally be opposed to running all of those through the tribes, because I think it just builds up a multiplicity of bureaucracy, when you could do the whole thing through IHS itself.

Congressman YATES. Would the gentleman yield further? The thought occurs to me, and I don't know whether this is heresy to suggest it, but it suddenly occurs to me, and I think only of the city of Chicago where we have so many hospitals: Why do you need separate Indian hospitals, as long as you can provide the delivery of health care? Second, we do know that there are many areas of the country, in rural areas, where you don't have adequate health facilities.

Suppose you were to build adequate health facilities that would take care of not only the Indian people but the non-Indian people as well? I know there is a desperate need for Indian health facilities on and near the reservations. But that is true in many other rural areas as well.

Do you want this to be an entirely separate Indian system?

Commissioner DIAL. Mr. Chairman, I would like to speak to that, also. It seems to me if you had adequate facilities in places like Chicago for all people, then it would not be necessary to have a special Indian clinic or a special Indian health facility.

If you had adequate facilities for all people, then they would automatically be taken care of and they would not have this problem of relating back to the reservation and being off the reservation in an urban setting.

It seems to me that the problem, really, that Congress needs to deal with, and we are going to have to deal with it one of these days, is a good national health program that will take care of all people and when they come around with such a program it will exceed any Indian program that we have now on the reservation or off the reservation.

That is what we need. But if you are going to speak of a health program or facilities for people on the reservation or off the reservation: What happens once again to the nonfederally recognized tribes?

How about shooting some money into, say, Robeson County for 27,000 Lumbees, to supplement the present health system?

Dr. ZELL. Commissioner Dial suggested, prior to your question, a solution for total health care to be delivered to all people.

Commissioner DIAL. I think that would be the best answer, and you would not have to worry about if an Indian is taken care of if he is in the city of Chicago, yet he is an enrolled member back on the Sioux reservation.

Dr. ZELL. I would, however, stress that throughout our year of study, and many Indian people expressed the view that they wanted and needed facilities and treatment people, be they physicians or nurses, that could relate to them culturally, that were attuned to Indian diseases and illnesses which may be more prevalent, for instance, otitis media and diabetes and medical staffs attuned specifically to Indian problems, as well as the Indian culture.

As you know, many Indian people do not speak English.

Commissioner DIAL. Could you not employ such people in the same facility? Where you have many Indians, you could have some Indian people working.

I raise this question and the question is: Which is best? A good national health program for all people, or what we have been talking about for the last 15 or 20 minutes.

Congressman YATES. What would you do with the concept of tribal government if you rely on this system?

Commissioner WHITECROW. I think you tear it down. If you rely on that system——

Mr. YATES. Unless you provide for delivery to Indian people through treaty with the tribes.

Commissioner WHITECROW. If we are really talking about making the tribal governments self-sufficient, we have to funnel it through the tribal government.

Chairman ABOUREZK. You mean for off-reservation?

Commissioner WHITECROW. For off-reservation.

Commissioner DIAL. It would not have to be in the case of off-reservation people, because if you had an existing system for all people off-reservation, it would work. And there would be no question and redtape relating back to the reservation or saying, "Go back to your reservation and get this treatment or that treatment." They would deal with it immediately.

Commissioner WHITECROW. What would that ultimately do to the Indian health facilities that were out in the boondocks?

Commissioner DIAL. I don't see where that would have anything to do with it.

Commissioner WHITECROW. Those facilities that are isolated, those facilities, John, that are up in your area, the clinic facilities that you have way back up on the North Slope. Those facilities are isolated in reservation areas.

Commissioner DIAL. You are speaking of the reservation?

Commissioner WHITECROW. Right.

Commissioner DIAL. I am speaking of off the reservation. The off-reservation people, I am saying, once you had a system which would serve all people off the reservation, you would have no problem off the reservation.

Mr. ALEXANDER. I would like to pick up Congressman Meeds' point about off-reservation health care.

Chairman ABOUREZK. May I recognize Ernie? He had his hand up.

Mr. STEVENS. I want to drive home a point here. I believe that one of the main problems that we have, I think it even goes to the heart of particularly the Lumbee situation and many others is that in reference to the kind of thoughts you are developing here, what it really comes down to, and it is the same thing in the urban areas, is that if you can

determine that Indian people should be recognized apart under any kind of existing system, so as to guarantee that they get their share of those services, you will have gone a long way.

Like, for instance, the Indian Health Service type facilities. It is not the practice, I don't think, of the overall health service to run hospitals.

But it is of the Indian Health Service, for peculiar reasons. Those can go on. But I think there is something in this whole business between federally recognized tribes and non-Federal that is misunderstood by tribes, and probably non-Federal people.

The whole thing about it is that Indian people who are nonfederally recognized or in urban areas are denied services that all other citizens get, many times on the basis that they are Indians. I was an urban center director, and that is the kind of thing that came up.

We got the last of it, and all Indian people want is just a special recognition that they are Indian people, and that this be provided for in legislation, or whatever kind of direction is needed.

I am not familiar with the health bill. But if there is some kind of health bill that it will take care of everybody, all that is needed is that Indian people are specifically provided for.

Office of Native American Programs would be a situation, and many other kinds of programs that extend to other people—domestic assistance-type people.

Commissioner DIAL. Ernie, I would say that funds to Robeson County, say, for Lumbee people, some 27,000, you could say, "Well, you have enough there to support an Indian clinic."

I personally, would not care to see an Indian clinic as such. I would like to see more funds there for Indian people and make the existing facilities more efficient.

So when someone needed treatment they could get it. This is what I am speaking about, they would not be denied this over whites. If they needed surgery, they could get it if they did not have the money.

When they walk in and don't have a dime they would not say, "Well, you have to put down $50 or $100. We can't touch you until you get the money."

Maybe he sells his last hog out of a smokehouse. I have known of cases like this. This is the kind of thing I am speaking about. Now I understand that the reservation system is quite different.

That Indian health there is different. But I am only saying, really, if you have an efficient program off the reservation that served all people, a national health program, that you would not have the problem of Indians off reservation needing medical attention. That is all.

Chairman ABOUREZK. Can I make one point, Paul? To what Jake was talking about. I think Jake said if you start providing through IHS off-reservation health care to a great extent it would tear down the authority of the tribes.

Am I inaccurate? Is that what you said?

Commissioner WHITECROW. No, that is not what I said. What I said, if the money should be provided through IHS, contract health care money, and then the money provided through the tribes, if the tribe desires to contract, if the tribe desires to utilize those funds to provide the money for their tribal members, then they would have the preroga-

tive of providing health care for their citizens in any manner away from the reservation that they so desired.

The money could be provided, as Lloyd indicated, right through one system. It would not be building up an additional bureaucrat system.

It would be utilizing that tribal government, to require that tribal government to be responsible for its people.

I think these tribal governments really want that responsibility.

Chairman ABOUREZK. That may be true, but I don't necessarily agree with you when you say it would tear down the authority of the tribes, if you do it through IHS.

Just the concept of tribal government itself means that they are going to govern within a certain boundary. If your citizens start scattering, what they do or don't do with the citizens who have scattered does not have much impact on what happens locally within the boundary of the reservation itself

Commissioner WHITECROW. That is true.

Chairman ABOUREZK. For example, it is easier for the tribe to set up a clinic in Rapid City, because they are 100 miles away. But there are an awful lot of Oglalas out in Los Angeles, thousands of them out there, and San Francisco and Chicago and Cleveland, and so on. How are they going to start doing that?

I think it would be very difficult for them to start doing that, in fact. I think it ought to be a flexible thing.

I don't think we ought to establish a principle that they should do it everywhere. But if the tribes can conveniently do it, for example, they could do it throughout South Dakota, and all the communities where Indians have moved to, off the reservation.

Commissioner WHITECROW. Let me write this up in the form of a recommendation, and I will provide all of the Commissioners with a copy of it.

Chairman ABOUREZK. Good. Let's bring this phase to a close and move on.

Mr. MEEDS. Could we ask Mr. Martone if he has any observations in this field?

Chairman ABOUREZK. I didn't let Paul finish. Then we will get to Mr. Martone.

Mr. ALEXANDER. There is a fundamental issue that you touched upon awhile ago that gets lost. Ernie touched upon it too in the urban setting, and you touched upon it, Dr. Dial. That is the assumption that if medical care were freely available to all citizens, that the urban rural Indian would be taken care of.

The evidence strongly suggests to the contrary. There are substantial patterns of practices of discrimination by public and private health care providers in urban centers.

Rather than using Robeson County as an example, where, with a long, hard fight, Lumbee people have achieved some political power to hold people accountable.

Let's take the 3,000 Lumbees in Baltimore, who have no political power to hold that city's bureaucracy accountable. Those people have an office of civil rights in HEW that sits and waits for somebody to issue a discrimination complaint in the health care area before they will move.

They don't monitor effectively. They don't do anything effectively. It is like in the early sixties you were saying, unless somebody filed a complaint there were not restaurants that were discriminating on the basis of race.

It is people who get turned down who are not necessarily cognizant of their full range of rights.

Where they go to resources to redress those rights, don't file complaints. We have a system on the books. We have a title 6, an Office of Civil Rights, a Justice Department, and they do zero in in terms of health care discrimination.

One of our recommendations, and it is not well phrased and will be altered, is a congressional mandate to the Office of Civil Rights to not sit back, but to go out and affirmatively monitor the health care providers in situations where there is some basis for believing there is a pattern and practice of discrimination going on.

They are really very culpable.

Mr. MEEDS. Mr. Chairman, I would just say that these are those areas where, if we go back to some basis that we can handle quite adequately, that is: (1) you define and identify what is a tribe; and (2) you identify what is an Indian.

If we have a special obligation, as I believe we do, under treaties and statutes and the Snyder Act, clearly, to provide health for Indians, then you do it in IHS facilities where they are available. And where they are not available, in other health care facilities. IHS is a payment agency. Some of the Commissioners think it should be through tribes, but I personally believe IHS should reimburse.

We still need the outreach programs. We need the outreach programs for some people who would not even qualify as Indians, because they have some special problem as members of a minority race where they don't get on well with blacks, and they get shunted aside.

We still need outreach programs. We still need clinics to advise the tribal members, those who can qualify for their rights, because they get shunted off many times. And to advise people who could not qualify as Indians, as members of tribes, that there are health facilities.

They might qualify, and probably will qualify, under medicaid or medicare. That, I think, is a full off-reservation program for Indian health.

Chairman ABOUREZK. I tend to agree with that.

Mr. MEEDS. You have to identify who are Indians.

Commissioner BORBRIDGE. Mr. Chairman, in taking that one step further, I very much agree. What I see in what you stated, Congressman Meeds, is that there is utter compatibility between the characteristic of tribal sovereignty, and the right to determine tribal membership.

As long as that is observed, it may well be that in different circumstances, a tribe may not be able, for various reasons, to contract directly.

But, certainly, determination of membership even in that instance, is a manifestation of sovereignty, whether one contracts or not is determined, essentially, on what is best for the individual or group of patients in a given circumstance.

Mr. MEEDS. Certainly, and where there are IHS facilities located on reservations, as there are many on the Navajo reservation, and there are many in Alaska, then the local Indian or native people should

have a substantial input as to the kind of services, kind of facilities, just a local advisory group that has to be listened to.

In some instances they may be able to contract services.

Commissioner DIAL. Mr. Meeds, I assume that you would be rather conservative with your definition of Indian, pretty much as the Congress looks at an Indian now, if it is existing legislation.

Mr. MEEDS. I have always been very liberal on this. I just think it has to be done, though.

Commissioner DIAL. I was just wondering where you stand on it. I would like for you to expound on that.

Mr. MEEDS. I feel this Commission has to come forward with their recommendation about what are presently existing tribes, the mechanism to allow tribes to identify as tribes in the future under certain criteria to be identified as tribes, and then all tribes to identify their membership.

Commissioner DIAL. Fine. Very good.

Mr. MEEDS. Those, then, will be Indians; and nobody else.

Mr. TAYLOR. I wonder if I might address the point of definition of Indian?

Chairman ABOUREZK. Fred Martone is next, and then we will go to you.

Mr. TAYLOR. All right.

Mr. MARTONE. I usually put my blinders on to start with and try to look at legal duties in the first instance, to see what it is that we have, and then in that way you can decide where you want to go in terms of what you ought to do.

But it seems to me you have got to look at the rights, if any, to health care in this country in general. Generally, the States have no duty to provide health care to its citizens. And in like manner, absent Federal legislation, the Federal Government has no duty to provide health care to its citizens.

We have come a long way from that kind of absolute approach. So now we do have programs for various groups, medicaid and medicare.

We have special programs for military personnel and retired military personnel. We also have special programs for American Indians that are different than for non-Indians.

It seems to me that latter group can be divided into two parts. There are probably treaty obligations and contractual rights between the United States and various Indian groups, which you could categorize as legal duties.

Those will have to be defined by particular treaties, the particular course of relationships, the particular statutes, which may have been enacted to fulfill preexisting contractual obligations, as evidenced by treaty, Executive order or agreement. Those, it seems to me, are reasonably uncontroversial, because they are asking the American people to fulfill its moral obligations, to fulfill its contract.

On the other hand, when you are talking about spending programs for Indian health that are not tied to contractual obligations, then you are talking about a health program which is not now available to other American citizens.

Of course, Congress can do that under its spending power, and under its commerce power. But the question that it seems to me was raised by

the colloquy between Commissioner Dial and Mr. Meeds is whether or not the American people would be prepared to go beyond its duties and provide a health care system for Indians which it has not to this date provided for itself.

It is one thing to affirm a preexisting duty to do so, and those duties can be defined by contract or treaty. It is another thing to create a comprehensive health care system for one class of people which is not tied to preexisting duty—where you do not do the same thing for everybody else.

It seems to me that that would be asking a lot. It is one thing for a citizen to say, "I will fulfill my duties to others." It is another thing to ask them to go beyond that and say, "I am going to do for them what I am not now prepared to do for myself."

Mr. YATES. What do you do about the trust responsibility?

Mr. MARTONE. This goes back to yesterday. It seems to me you need conceptual clarity in that area.

The trust responsibility, to me, does not mean that the Federal Government can or must spend anything and everything for American Indian tribes or American Indians.

Its responsibility is defined by treaty, course of relationships, and contractual agreements.

Chairman ABOUREZK. Is there a nontreaty trust responsibility?

Mr. MARTONE. I don't think so. The country can go beyond that, and it has. The whole Indian Claims Commission, as I understand, is based upon a moral obligation to go beyond treaty obligations.

But it seems to me you ought to identify it, when you are going beyond your legal obligations. You ought to identify that it is part of a Federal spending program, and then the country has to ask itself whether it wants to do for others what it is not doing for itself.

Chairman ABOUREZK. Fred, I don't necessarily disagree with that concept. However, I think to use the argument that because a lot of non-Indians can't have that kind of program, therefore, deny it to Indians, it is kind of like the dog-in-the-manger argument.

It may sell amongst a lot of people in this country. But I don't think it is an argument that the Government ought to necessarily buy.

Mr. MEEDS. I think he is saying that, Mr. Chairman.

Chairman ABOUREZK. Well, he is not personally saying it. He is saying that is going to be the feeling.

Mr. MEEDS. He is saying: Define your legal obligations and clearly label those things that are not legal obligations, and do what you wish with them.

Chairman ABOUREZK. I understand that, and I understand it totally. All I am saying is that the other argument that Fred uses: That here we are going to provide something to Lumbees that ordinarily North Carolinians can't have.

Commissioner DIAL. Mr. Chairman, Mr. Martone, you are saying to overlook the fact that the U.S. Government over the years can do no wrong.

You seem to overlook the fact that the U.S. Government has erred, and you seem to overlook the fact that the U.S. Government, for some reason or other, failed in its responsibility in recognition of Indian tribes.

Now recent recognition has come to Indian tribes, where no treaty obligation is involved. Therefore, say in the case of the Lumbees, they do not fall in the same category as other Robesonians.

Lumbees are located in Robeson County. They do not fall in the same category as non-Lumbees in Robeson County.

Do you see my point?

Mr. MARTONE. Yes; I understand.

Commissioner DIAL. Do you agree with this?

Mr. MARTONE. I agree with the facts, as you have stated them. But I am suggesting that those wrongs, whether they be real wrongs or imagined wrongs, are not the kind of considerations that one looks at in terms of defining legal duties.

It may be that the United States wants to recognize that historical reality and say that it wants to do something about it, and provide a comprehensive health care program for nonfederally recognized Indians.

All I am saying is that when they do that they have to understand that they are not now fulfilling existing legal duties.

Commissioner DIAL. I think you tied yourself to the word "treaty" there. That is where you made your mistake. When you tied yourself to "treaty."

Mr. MARTONE. The legal duties of the United States for tribes are created by its treaties, its statutes, Executive orders which, perhaps, rise to the level of a treaty or agreement, where the course of conduct of the Congress is such that one could make that conclusion.

Commissioner DIAL. But they are spending dollars today on tribes where there is no treaty obligation.

M . MARTONE. That is right, and I am saying when you have that situation you should recognize that it is a general spending program, rather than the fulfillment of a legal obligation.

Commissioner DIAL. And you would not oppose that?

Mr. MARTONE. I would need to know more about the content of that.

Mr. ALEXANDER. Congress has already defined its own interpretation of what it views the trust responsibility in health care to be, and I will read it to you:

> Federal health services to maintain and improve the health of Indians consonant with and required by the Federal Government's historic and unique relationship and resulting responsibility to the American Indian people.

That is the first full sentence of the Indian Health Care Improvement Act of 1976.

Chairman ABOUREZK. Let me bring this phase to a close. I think we understand what Fred Martone is saying. He is not taking a position on it, necessarily.

What he is saying is that he believes providing health care to nonrecognized tribes is outside the scope of the trust responsibility. If we decide to provide it or recommend providing it, we should label it as extra trust responsibility, or whatever you want to call it.

Mr. YATES. I don't think that is what he is saying at all. I assume he can speak better than I can for him.

What he is saying, I think, is you ought to define what the trust responsibility is. I must say, speaking personally, I just assumed there was this overall broad trust responsibility that was just general,

insofar as our relationships with the Indian people are concerned, and it just pervades everything. What he is saying, as I understand him, is that the trust responsibility springs from treaty and from statute. If that is wrong I wish he would say so.

Chairman ABOUREZK. Let's ask the other lawyers if that is the case.

Mr. YATES. Let's ask him if that is his case first.

Mr. MARTONE. I think that is generally correct.

Mr. MEEDS. And the course of the conduct, he said, is statutory interpretation.

Mr. MARTONE. Yes.

Mr. YATES. Do you agree with that?

Mr. ALEXANDER. I think we would have a different definition of what the course of conduct infers. We discussed in November, and briefly in January, the dependency notion, which courts clearly have recognized.

Mr. YATES. It permeates everything.

Mr. ALEXANDER. It permeates everything, and every tribe that the Federal Government has a political relationship with, it has trust responsibilities too.

The point on nonrecognized Indians is that the Federal Government has inappropriately excluded them. They should be part of that trust obligation.

Mr. YATES. What trust obligation?

Mr. ALEXANDER. As we define it in the trust chapter, we deal with what we considered primary and secondary components of the trust.

Health care would fall within the secondary components of the trust, which is an obligation to bring the standard of living, health care, education, et cetera, up to a par standard with the rest of the population.

That is a flexible, congressional, Federal obligation, and it will vary with time and circumstances. We were not willing, and we are probably not willing today, to define it with a great deal of specificity, because we cannot anticipate true events of the future and how that obligation will shift and change.

If the Federal Government will live up to its obligations to Indian people in the economic development area we are talking about the support of tribal government.

If Indian reservations and tribes were self-sufficient, economically viable entities, there would be a substantial impact on the Federal Government on the secondary components of the trust.

We would like to, in good faith, assume that that will happen, but history has not shown that to date. We consider those social service components of the trust as flexible things, not subject to detailed delineation at any given point in time.

But shifting with circumstances—the dependency circumstances of Indian people.

Mr. MARTONE. I think there is some pragmatic appeal to that approach, but it does not reduce itself to the realities of legal duty.

Let me give you an example. If, for example, a particular treaty with a particular tribe had a provision in it in which the United States has said it will provide for the health and welfare of the Indians of that tribe, it would be my opinion that that comes within whatever the trust responsibility is.

I don't know what that trust responsibility means. At least I know that is a treaty obligation, and there we are talking about a legal right.

I don't know if that is a property right, and if that treaty were abrogated, I don't know what the fifth amendment consequences would be, but there might be an argument that that is a property right.

Mr. ALEXANDER. There certainly would be.

Mr. MARTONE. On the other hand, absent such a treaty provision, if the Congress of the United States enacts legislation providing for comprehensive health care for Indians and does not tie itself down to a particular legal duty, but is going to use that as a vehicle to fulfill, on the one hand, all its legal obligations through these treaties, and, on the other hand, to provide health care for Indians, whether they are legal obligations or not, that is not under some trust responsibility.

That statute can be repealed tomorrow. Then the question is: What are the consequences? For the consequences to inure to the detriment of the United States, one has to see whether or not the United States has some legal duty to provide the services.

To do that you go back to the existing documents, and if there is a treaty that says so, there is a problem. If there is a treaty that does not say so, then all the United States has done is withdraw a spending program.

Our basic, fundamental problem is this: I take the view of the Supreme Court in the *McClanahan* and *Mescalero* cases, that to define these problems one looks at relevant treaties and statutes.

I think Mr. Alexander will take the contrary view, that somehow we look at the notion of inherent tribal sovereignty, that somehow we look at some broad range of trust responsibility, and use some canon of construction that should result in a favorable outcome of conduct toward the Indians.

And, bingo, one reaches his conclusion. I am neither for nor against social programs or health programs. All I am suggesting is that the basis for those programs ought to be clearly identified as to whether they are based on legal rights and duties or whether on the other hand they are spending programs.

So the citizen to whom every governmental body is responsible will know whether or not this program is fulfilling the legal obligations of his government, on the one hand, or whether or not it is a spending program, and he may or may not want to support that kind of program. That is why I raised the question. If it is a spending program, then the question is raised whether he should be doing for others what he is not now doing for himself.

He may want to do that, if it is a legal obligation. He may not want to do it if it is beyond that.

Mr. YATES. If I understand you correctly, then certain Indian tribes which have treaties, depending on what the terms of the treaties are, may have the opportunity for certain benefits and advantages from the Federal Government that other Indian tribes don't possess. Is that correct?

Mr. MARTONE. I am sorry, could you——

Mr. YATES. If I understood you correctly, what you are saying is that certain Indian tribes that have had certain benefits outlined to them in treaties with the Federal Government may be entitled to

more from the Federal Government than other Indian tribes which have no treaties with the Government?

Mr. MARTONE. That is certain. For example, Congress could not now withdraw a reservation set up by treaty without paying for it.

But as we discussed yesterday, it could now end all rights to aboriginal possession for the Passamaquoddy tomorrow.

Mr. YATES. There must be Indian tribes that do not have treaty rights with the Federal Government; are there not?

Mr. MARTONE. Yes; there are.

Mr. YATES. What is your attitude toward them?

Mr. MARTONE. My attitude toward them will depend upon the particular reservation, particular Executive order or course of dealings which may or may not have set it up, or what the agreements are.

The problem is we have literally hundreds of land masses, and I don't know how many Indian tribes, but I suspect we are talking about something closer to 100 than to 10.

Mr. ALEXANDER. Three.

Mr. MARTONE. So to answer that question, one would have to look at what the congressional intent was at the time that land mass was set up.

It is a question of legislative history.

Chairman ABOUREZK. That deals with my question. Hasn't the U.S. Government, at some point in our 200-year history, taken on a general obligation of stewardship of all American Indians, without respect to treaty?

I think the treaties make it more specific, but hasn't there been statement after statement by the U.S. Government that says the Indians are wards of the Government and we ought to undertake stewardship for all Indian people?

Does that exist?

Mr. MARTONE. I don't know about all Indian people, but you are right. There is language in various cases that says that sort of thing.

Chairman ABOUREZK. The Health Care Act is another one.

Mr. YATES. What does that do with your theory, then? As I understood it, your concept was founded upon treaties, and specific legislation as being the basis for Indian rights.

Now the chairman talks about the acceptance by the U.S. Government of a trustee relationship, apart from that.

Mr. MARTONE. I did not mean to suggest that I subscribed to that view.

Mr. YATES. Isn't that what you said?

Chairman ABOUREZK. I was not listening.

Mr. YATES. As I understood, your question addressed to Mr. Martone was that even though there be certain treaty rights, and certain Executive orders, apart from that the Federal Government has from time to time declared that it holds a trustee relationship with the Indian people.

Chairman ABOUREZK. All Indian people. Yes, that is what I asked.

Mr. MEEDS. I disagree with that.

Mr. YATES. He just said he agreed with it. That is the part I didn't understand.

Mr. MEEDS. He did not say he agreed with that.

Mr. YATES. What was your answer to his question?

Mr. MARTONE. Now I am not sure what his question was.

Mr. YATES. Would you ask your question again?

Chairman ABOUREZK. Yes; I would be happy to. Before I ask it, the record that was just passed out to you contains Fred's law review article, and it is in S. 2353, so you are now immortalized, along with all the other great speeches in the Congressional Record.

My question is: Treaties and agreements aside, has not the U.S. Government time after time, or at different points in our history, taken on the responsibility of the stewardship of all the American Indian people, based on a sort of unwritten moral obligation on the part of the Government to provide for the aboriginal people who were here when the settlers came?

I think that was the basis for it—that we kind of came and moved them around as we saw fit. In come cases we wrote treaties and in some cases we didn't. Hasn't that been stated time after time?

Mr. MARTONE. No; I don't agree with you. Let me provide an example in which treaty and statutory analysis will produce one result, and the subscription to a broad Federal trust relationship would produce another.

In the 1973 *Mescalero Apache Tribe* case, the Mescalero Apaches set up a ski resort off the reservation. The issue raised in that case was whether or not any New Mexico gross receipts tax on the income derived from that off-reservation ski resort was a valid tax and, at the same time, whether or not a use tax on the personal property purchased and affixed to that off-reservation ski resort imposed by the State of New Mexico was valid.

The Supreme Court looked at the treaties and statutes and right off the bat said, "We are talking about off-reservation activities here, clearly State law applies, absent some governing act of Congress." When they looked at these two taxes, the Indian Reorganization Act under which that ski resort was set up provided that any land purchased by a tribe pursuant to the act would be exempt from State taxation.

So the court struck down New Mexico's use tax for personal property, because the court said that personal property attached to the real estate, and Congress by specific act exempted that real estate from State taxation.

On the other hand, it upheld the gross receipts tax, saying, "There is no exemption here. The State of New Mexico can tax that."

If you look at treaties and statutes, you go through that kind of analysis, and reach those kinds of results. I am afraid if you looked to some broad Federal trust relationship, and we can ask Mr. Alexander on that, I think that kind of analysis would say, "Let's see. The Federal Government has a trust relationship to this Indian tribe, and it is operating this ski resort."

It has been our policy to insure, and I am generalizing, that reservation Indians are insulated from State taxation and control, and we would see no State purpose served by allowing them to tax these Indians.

We think that because of the Federal trust responsibility, maybe this ski resort should be immune to State taxation, even though it is off the reservation.

You are getting into balancing acts there. You are talking about what is and what is not part of some broad, undefined concept that does not relate to a specific source of positive law.

Chairman ABOUREZK. I have to say I don't see the parallel at all, because that deals with jurisdiction and tribal sovereignty.

It has nothing to do with the overall obligation of stewardship that I was talking about with regard to the Federal Government.

Mr. MARTONE. Mr. Alexander can correct me if I am wrong, but I think he would disagree with the outcome of that case, because I think he would say that the United States had an obligation to make sure that the New Mexico tax was not applicable.

Mr. ALEXANDER. Off reservation. I chose that as a jurisdictional case. If the State of Nebraska owns land in Iowa—you have a similar issue.

I don't see that as you describe it. I agree with the chairman.

Mr. YATES. What happens in Iowa to the land owned by Nebraska? Is it subject to taxation?

Mr. MARTONE. What was the question?

Mr. YATES. The example he gave, of the State of Nebraska owning land in the State of Iowa, and Iowa taxes the land. Is the State of Nebraska subject to the tax?

Mr. MARTONE. It is, and, in fact, the State of Iowa can take the land by eminent domain.

Chairman ABOUREZK. I don't think it deals with the question.

Mr. YATES. Does that case deal with the trust relationship? All that case is, as I understand the colloquy, is that you do have conflicting jurisdictions, and the question is whether or not you can tax another sovereign body, sovereignty, of course, being a question of limited trusts and so forth.

How does that bear on the trust relationship? I know how you explained it, and how you explained Paul's presumed reply, which he rejected, saying it was a question of jurisdiction and not a question of trust.

Mr. MARTONE. Because of the general trust relationship, the United States has interest in Indians who go off the reservation. It has an interest in educating and providing health care services to Indians off the reservation. We are concerned with the adoption of Indians off the reservation, and this was all under the banner of some general Federal trust relationship.

How does that fit? How does that fit, if now we are talking about off-reservation activity? If the Federal responsibility follows the Indian off the reservation, for health, education, and adoption purposes, why would it not also follow it in terms of its proprietary interest off the reservations, such as taxing?

Mr. YATES. Would your concept of the trust relationship be such that a tribe of Indians moving away temporarily, or a group of Indians belonging to a certain tribe moves off its reservation land and moves over to another area where the fishing is better and starts to fish, say, on State lands.

If I understand your concept of the trust relationship, the State could do nothing to stop them. Is that right?

Mr. MARTONE. I am not sure I followed your question.

Mr. YATES. Let's stay away from Washington and go to Idaho. There are a group of Indians on a reservation in Utah. They move into the State of Idaho, where there is good fishing, and the State kicks them out saying they don't have licenses.

If I understand Paul's concept of the trust, there is nothing the local State could do to them because they are wards of the Federal Government.

Mr. MARTONE. You would have to ask Paul that. My answer would be, unless their right to fish there is guaranteed by treaty in an off-reservation posture, then of course, the State can ask them to move.

Mr. ALEXANDER. Sure.

Mr. YATES. The point I am trying to get at, as I understood your explanation of the trust in the ski case—it is the same kind of a case; isn't it?

If it is one of trust rather than jurisdiction? In the example I gave, it was one of jurisdiction rather than trust.

Mr. MARTONE. That was precisely my point, that this trust relationship does not extend in some general way, in a generally applicable way to every transaction.

Mr. YATES. That is right. Where do you draw the line, Paul? Where does the trust begin and end?

Mr. ALEXANDER. The way we have drawn the line, in terms of the trust, is in terms of the Federal Government's obligation. It has a fixed, permanent obligation in protecting land resources and the permanency of the tribe, by our definition.

On the other things—the examples that can be given in the social service areas—it is a basis for governmental action that is flexible, depending upon circumstances.

Clearly, in the situation you were talking about previously, the Government would have a trust basis for acting to protect the Indians' right to fish in that area.

You don't have to do that, because there are basic treaty rights in that area that you can adhere to for those rights.

What I am saying, when you are talking about the secondary components of the trust, we are talking about a flexible obligation. Congress defines and interprets as circumstances warrant. In fact, the removal of some of those may raise legal cases. Case law is not settled on that.

Mr. YATES. What if there is no definition by Congress in a particular case?

Mr. ALEXANDER. Then the definition would occur through litigation, instance by instance.

Chairman ABOUREZK. May I interrupt here? I want to move this along. I just want to make an effort to put this in perspective and see if the Commission agrees with this.

First of all, the Commission has been instituted to recommend an American Indian policy to the Congress, and asking Congress to adopt that policy. For purposes of determining that policy, we are also determining what sort of legal and moral obligations the Government has to Indian people. Once we have determined that, and I think we have gotten fairly well along that road. Do we determine additional policy?

Based not upon specific agreement, but based upon moral obligation that the Government might have or might want to have toward the Indian people. Therefore, just as an example, it was never stated in any treaty that I know of that the U.S. Government shall protect the mineral resources, the oil and coal, sitting under Indian lands.

Does anybody know of a treaty? I don't think there was one, because they didn't know about it in those days.

Mr. MEEDS. Absolutely. There is an immediate trust relationship here, because the land was taken in trust by the Federal Government. The Federal Government is the trustee of that land.

Mr. YATES. Plus everything on the land.

Chairman ABOUREZK. That is right. But it was never specific——

Mr. TAYLOR. It does not say that in treaty, though. You are right.

Chairman ABOUREZK. It was never specifically stated that that responsibility was taken on later on because the Government feels a moral obligation—it should feel a moral obligation to protect the northern Cheyenne's coal resources, and so on.

Mr. MEEDS. It was never specifically stated, Mr. Chairman, because when it was taken common-law duty and responsibility of a trustee attached.

Chairman ABOUREZK. Now, as far as establishing policy, I think it is futile to argue about whether or not it has evolved in an agreement.

I think what we have to do is determine what our policy is going to be. Do we want to provide health services to the Indian people or don't we? It goes back to what I tried to say yesterday, Congress can do it if Congress wants to.

Mr. YATES. That is not the question.

Mr. MEEDS. Mr. Chairman, I think Mr. Martone would agree with what you have said. The question is: Do we label these things so that we know which are obligations and which may be the fulfillment of what we feel to be some moral——

Chairman ABOUREZK. I think we have done that in the legal concept section.

Mr. MEEDS. I think it goes back to a question of tribal sovereignty.

Chairman ABOUREZK. I want to exercise my prerogative as a chairman to say that we ought to move on. We have debated it, I think at length, and we understand what Mr. Martone has said.

Mr. MEEDS. Let the record show that I agree with the narrower interpretation: That these things ought to be defined, that we ought to have a recommendation as to what trust responsibility is, and that we have to clearly define when we are going beyond that trust responsibility.

Chairman ABOUREZK. We can do that, but I just want to move on, because we are never going to get to writing this report unless we do move on.

I think it is good to discuss these things, but I don't think we ought to go in and start counting the number of angles on the head of a pin.

Pete Taylor has been asking for recognition.

Mr. TAYLOR. I just wanted to express agreement with the proposition that you advanced when this debate started, Mr. Chairman.

I think the course of dealings with the Indian people in this country has been generally uniform. There was a development in very uniform

fashion. I agree with your proposition, Mr. Meeds, that when the United States asserted jurisdiction over these areas they assumed trust obligations.

I also feel that the trust obligations run beyond just natural resources, but also to human resources, which I am sure you would agree with—education and health.

I do think that a definition and some perspective is needed to be put on this thing, and I hope we will develop that for the next meeting.

In accordance with the chairman's desire to move on, I will limit my remarks to what I have said.

Mr. FUNKE. I just wanted to point out, if you look at it from the historical perspective, that the eastern tribes are in great disadvantage, in terms of the treatymaking.

Most eastern tribes were overrun, without having made treaties, and that historical fact was recognized at the time the IRA (Indian Reorganization Act) was being debated. There was a debate as to whether the nonfederally recognized tribes or nonfederally recognized Indians should come in under the provisions of the IRA.

They determined that the Government had failed to enroll a number of these Indians and included in the definition of Indian that all half-blood Indians, whether they are members of a federally recognized tribe or not, would be eligible to obtain trust land or any of the other provisions of the IRA.

So nonfederally recognized Indians are eligible for IRA benefits, to that extent.

Commissioner WHITECROW. What law is that?

Commissioner BORBRIDGE. I agree very much in terms of where we want to go, but with respect to what has happened, from an historical perspective, I think what is important to the Indians here is that if the acknowledgement of a moral obligation will lead to a more consistent posture in terms of the policy of the United States toward the Indians, then I am not at all opposed to using that.

However, I would be very much concerned were this to suggest by any means that the Indians were conceding that there was not a well-developed legal basis, or that there were not, in fact, a number of tribes exercising sovereignty today.

Admittedly, there are exceptions to this, and I agree that we could spend the rest of our time here as Commissioners hearing about the exceptions.

I want to state for the record that I consider that the record and the cases, including those that the Indian tribes have won recently in the Supreme Court, very clearly indicate that there are a number of instances where we are going beyond a "moral obligation" when we refer to the Indians and their entitlements.

But regardless of which particular category these may fall into, from the past up to today, we are looking for a higher standard of conduct for this Nation.

I view the Commission, as you do, Mr. Chairman, as the catalyst for coming forward with an enlightened attitude. It may be that the final battle will not be whether or not a certain degree of services will be made available in a more consistent atmosphere, but whether or not these will be regarded as a logical extension of a clearly established trust responsibility by the United States toward the Indians.

Chairman ABOUREZK. Thank you. Now I want to ask a question.

Commissioner DEER. One question. Earlier, Pete Taylor talked about his definition of an Indian. Are you prepared to make comments on this now or later?

Mr. TAYLOR. I would like to make a couple of observations on it. Much of the discussion here is related to persons who are members of a tribe. As Karl pointed out, we do have laws that have extended benefits or application of Indian legislation to people who are not members of Indian tribes.

Just to put this out for consideration, we have situations in Oklahoma where there are people who are members of Indians tribes, but their blood quality is very diminished. While at the same time his next door neighbor might be 100 percent, but descended from three different tribes, and therefore not be a member of any Indian tribe.

So we have a real problem with the definition of Indian and the extent of the Federal responsibility. As we prepare our paper on definition of an Indian, I would expect this to be a subject for debate at the next meeting.

Chairman ABOUREZK. Now, my question to the staff is this: What specific recommendations do you have prepared for the Commission to vote on today?

I have to say this. I am growing increasingly concerned that we are not going to have time to get this report finished, and I think, while we ought to debate, and I for one am very glad, for example, that Fred Martone is sitting here making us sharpen our focus and making the staff sharpen their focus on these things.

Fred, it is kind of tough to sit there being a minority of one. I have been one myself, on a number of occasions——

Mr. YATES. And rightfully so. [Laughter.]

Chairman ABOUREZK. Try to get into the Middle East some time. [Laughter.]

But I just hope you don't feel like you are being attacked from all sides, even if you are. I hope you don't stop doing what you are doing, because I sincerely appreciate it, even though I might not always go along with you.

But we have got to get this report done, and we have got to start voting on recommendations and we have got to start doing it today.

My question to the staff is: What is ready for us to vote on so we can get it out of the way and go on to something else?

Mr. ALEXANDER. We voted on the child welfare thing earlier this morning. We voted on the first section of the trust recommendations last January. We have not voted on the legal counsel portion of the trust recommendations.

Chairman ABOUREZK. Give us a proposal. Give us the issues.

Mr. YATES. What chapter is it?

Mr. HALL. Chapter 4, page 16.

Chairman ABOUREZK. I present the issue to the Commission.

Mr. HALL. The last meeting we discussed what to do with respect to conflict-of-interest, legal representation, and what recommendation we should make with regard to some concept of Indian trust counsel authority, et cetera. The proposal we have prepared is in subsection D, starting at page 16.

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What that does is this: It presupposes a recommendation from the Commission for establishment or creation of a Department of Indian Affairs.

Within that Department would be something that we have entitled, "Office of Trust Rights Protection." It would be a quasi-general counsel for the Department, with litigation authority.

It contemplates removal of those services currently provided by the Division of Trust Services in BIA to that office.

It contemplates removal of Division of Indian Affairs, the Solicitor's Office in Interior, to that office.

It contemplates removal of most of the responsibilities of the Department of Justice for litigation and representation of Indians in trust matters to that office.

The first paragraph, subpart D–1, sets out that:

> There be established within that new Department this Office of Trust Rights Protection. Its duties shall include inventory and assisting in management of trust property, advising Indians in legal matters, representing them in litigation and administrative proceedings.

It would also have in the field offices of the Department of Indian Affairs a legal staff, something comparable to the Regional Solicitor in the Department of Interior, currently. Although this legal staff would be dealing solely with Indian matters, not with the whole panoply of responsibilities which the regional solicitor of Interior currently does.

Mr. YATES. You propose the office will have rights to institute proceedings on its own without request from a tribe?

Mr. HALL. No, sir. You will note that No. 2 on page 17 says:

> The Office of Trust Rights Protection shall be authorized to render all appropriate legal services which are currently rendered by Justice and Interior provided that the client Indian decides to accept such representation and services.

Mr. YATES. What about cases that affect all Indians, and not a particular tribe? Where you don't have a particular client.

Would the office have any jurisdiction over that? Or will they be acting only with respect to cases involving a request from an Indian tribe?

Mr. HALL. They would be bringing suit, as trustee for an individual or a tribe. They would not be bringing suit for American Indians as a whole. There would have to be an identified plaintiff, so I am not sure of the circumstances in which——

Mr. YATES. All right, then it would have to be a case involving a particular tribe.

Mr. HALL. Tribe or individual.

Mr. TAYLOR. A situation can arise where litigation affects the rights of all tribes. I think we will deal with that end of it in the Federal administration.

For example, criminal cases where jurisdictional issues arose. It may question the jurisdiction of one tribe or one court, but, in fact, the determination applies to everyone.

I think what we would be asking for there is that the Justice Department supply this new Indian agency with a potential impact statement. I am not sure I like that phrase, but I will use it for this purpose, apprising the agency of the fact that new jurisdictional prob-

lems are arising, so that this agency would have an opportunity to intervene with an Indian position on it.

Mr. YATES. Somebody would have to ask them to do it, though.

Mr. TAYLOR. Justice would be obligated to advise them that this thing had occurred. I think what we are trying to avoid here is a situation like the *Blackbird Bend* case that I know there has been some correspondence on recently.

I noticed in the letter that was written to you by the Attorney General—and I was impressed by the fact—that the Department of Justice is revising their U.S. attorneys' manual to lessen the probability of another *Blackbird Bend* situation arising, by first requiring the client's consent.

Chairman ABOUREZK. Any other questions?

Mr. HALL. Paragraph 3, to continue with the procedure on page 17:

> The Office would have primary responsibility for protecting, enforcing, and enhancing Indian trust rights, but this would not relieve other Federal agencies from acting consistent with the trust.

That is going specifically to the question of other Federal agencies taking action, which may abrogate or in some way infringe upon an Indian trust right.

The entire Federal Establishment would have to recognize that trust obligation, and act consistent with it. But it does not necessarily mean that other agencies would have to establish programing pursuant to the trust, or that Justice would necessarily have to bring suit because this new office would do so.

Mr. MEEDS. Mr. Chairman, we have been over this, and I think we can vote on the whole issue.

Chairman ABOUREZK. All right.

Mr. MEEDS. At least I am.

Chairman ABOUREZK. I am, too.

Mr. MEEDS. I will go against it, because I have some problems with part of it, but most of what he said——

Mr. YATES. What part do you have problems with?

Mr. MEEDS. The last part about paying for counsel, and some other things. On page 18.

Mr. YATES. Your problem is the award of attorney's fees by the courts?

Mr. MEEDS. Yes.

Mr. YATES. They do that now.

Mr. HALL. No. E, Congressman Meeds, as we discussed the last time, is a relatively minor change allowing for discretion in Federal court to give fees in Indian litigation, which they do in an awful lot of case law now.

Chairman ABOUREZK. They can take it up and decide what they want.

Mr. HALL. That is right. It is discretionary, sir. It is just providing another exception to the general rule in American courts that attorney fees and costs are not——

Mr. MARTONE. If I may interject, I think Congressman Meeds is not referring to paragraph E, but rather the continuation of paragraph 4 on the top of page 18, which is quite a separate issue.

Mr. MEEDS. We discussed this yesterday, and I indicated my problem with it.

Mr. YATES. What happens in the case where a large judgment is awarded to an Indian plaintiff? Should the Federal Government, nevertheless, pay all the costs of the suit?

Mr. MEEDS. According to this.

Mr. YATES. Yes; I am just asking the question. According to this they would?

Mr. TAYLOR. No; it authorizes the court to award attorney fees.

Mr. MEEDS. Not on page 18, "Shall represent——"

Mr. YATES. It says:

> In such cases the U.S. Government shall pay all fees and costs and the wishes of the Indians shall be complied with as much as possible in selecting counsel.

It says they "shall pay all fees and costs." There are cases where the Indian plaintiffs would be or have been awarded millions of dollars. Should the Government, nevertheless, pay the fees?

Chairman ABOUREZK. Wouldn't it be better if you had a provision that would give the trust counsel authority some additional money to hire outside help to work for them, rather than refer to the tribes, so that you could still use the resources of the lawyers themselves and bring in a specialist now and then?

Mr. HALL. That is what No. 4 does, Mr. Chairman.

Chairman ABOUREZK. It doesn't look to me like it does. It just says you refer the whole case out.

Mr. HALL. It may first refer to Justice and if Justice does not accept it, for one reason or another, then it has the discretion to hire outside counsel to represent the tribe or the individual, and pay the costs for that.

Is that not what you are referring to?

Chairman ABOUREZK. That is what I am referring to, but that is not the way I read it.

Mr. HALL. The bottom of page 17, the very last sentence, "The Office also shall have the discretion" and page 18 "the authority to engage private counsel to represent Indians, tribes, or groups in trust matters."

Chairman ABOUREZK. The next sentence is the one:

> The Office also shall have the discretion and authority to engage private counsel to represent Indians, tribes, and groups in trust matters. In such cases the Government shall pay all fees and costs and the wishes of the client Indians shall be complied with as much as possible in the selection of counsel.

I think that is what Lloyd is having trouble with.

Mr. MEEDS. And what follows.

Mr. HALL. This language is quite similar to the approach that the Indian Trust Counsel Authority took. Of course, that proposal had a very small staff, but it also had the discretion to hire outside counsel and pay for it to represent tribes when it could not do so or elected not to do so.

Mr. YATES. What happens if the newly created Office of Trust Rights Protection does not think it ought to file the suit?

Suppose it considers it to be kind of a nuisance suit?

Mr. HALL. It clearly will have the discretion——

Mr. YATES. Where does it say that?

Mr. HALL. To not take cases in which there is not an adequate, legal basis for doing so.

Mr. TAYLOR. I think that discretion would be authorized in paragraph 4.

Mr. YATES. All it says is "It shall have discretion to so refer those matters," if it does not have the staff, resources, or expertise to handle it.

It does not say that it has discretion to refuse the case.

Chairman ABOUREZK. I don't think you can mandate any lawyer, whether defendant or prosecutor, to take a case.

Mr. YATES. You are doing that here.

Chairman ABOUREZK. I don't see that.

Mr. YATES. You are telling them they are going to have to take the case.

Let's read what it says:

Advising Indians in legal matters—that is all right—representing them in all litigation and administrative proceedings involving Indian trust affairs, and so forth.

Shall be authorized to render all appropriate legal services now rendered by the Department of Justice and the Department of Interior, provided the Indian Client agrees to accept such representation.

Office of Trust Rights shall have the primary responsibility for protecting, enforcing, and enhancing Indian trust rights, but this shall not relieve any Federal agency from the duty——

Is it implicit in here that the office shall have the right not to accept a case that it thinks it should not accept?

Mr. HALL. "Appropriate legal services" would exclude anything that the Canon of Ethics would not allow for, and would exclude a frivolous case.

Chairman ABOUREZK. I am going to liken it to the duty of a prosecutor. Under the common law, a prosecutor can never be mandated by a court to take a case he doesn't want to.

Mr. YATES. Is that true in this case, too?

Mr. HALL. That is correct.

Mr. TAYLOR. For purposes of clarification, I think we could add that into this. A sentence to that effect.

Chairman ABOUREZK. Why don't you do that?

Mr. TAYLOR. That is the purpose of part E, behind this, because frequently Indian cases, there may be a feeling that it is not a meritorious case, and yet they take it into court.

I think over the last few years we have seen this.

Mr. MEEDS. I think we ought to make it clear now what we are doing, no matter what kind of a suit some nuisance wants to bring in, he can bring it and the Federal Government has to pay his legal counsel.

Mr. TAYLOR. That is the language we have agreed to add into here.

Mr. MEEDS. All right. But to say they don't want to take it, then you come down at the end and say.

Where there is a conflict of interest between the individual Indian and the tribe the Office shall represent the tribe and it shall engage private counsel to represent the individual, at Government expense.

Chairman ABOUREZK. Then put in "will have the discretion."

Mr. MEEDS. Whatever kind of suit, as long as you get a tribe on one side and an Indian on the other, a member of that tribe, you are going to have to pay legal counsel for whatever he wants to do.

It is just wide open.

Chairman ABOUREZK. Put in the words, "And it shall have the discretion to engage private counsel" in that section.

Mr. HALL. That is fine. But may we emphasize, this is not draft language? It is draft concept that we feel is the direction in which we think we should go. It is not a draft of statutory law.

Mr. YATES. What is our vote to be on? Approval of the concept, rather than the language?

Mr. HALL. Approval of the concept and the policies this sets out. But it does not necessarily mean each and every word.

Commissioner DIAL. It seems to me there are conflicting views here, and that maybe Mr. Meeds and Mr. Abourezk should get together with you fellows and work out a statement here that both could support, later, not today.

Mr. TAYLOR. I think that could be——

Chairman ABOUREZK. I think we can do it right now, Adolph, so we don't have to bring it back. Let's just say, page 18, line 7, "The office shall represent the tribe, and it shall have the discretion to engage private counsel to represent the individual at Government expense." What is wrong with that? We can't make it mandatory, under the common law it is not, and I don't think we should.

Does anybody have any objection to adding that in, in the section you talk about, Pete, add that in and let's vote on that?

Mr. MEEDS. Mr. Chairman, I just have basic problems with the Federal Government, absent some concept that we might adopt for the whole Nation, the Federal Government bearing everybody's legal expenses.

I have some problem with that.

Chairman ABOUREZK. But, Lloyd, the Federal Government does bear legal expenses in the discretion of the court right now in many, many cases.

Mr. MEEDS. It does not allow court discretion. It says "shall".

Chairman ABOUREZK. But it does. You are not reading section E.

Mr. YATES. He is looking at the top of page 18, not at section E.

Mr. HALL. We talked about it briefly yesterday. It is merely an attempt to insure that if the Office does not have adequate staff to carry the caseload, it has an opportunity to engage other counsel to do so.

The entire cost would be picked up if that office were prosecuting the case, and there is no reason that we can see why the entire cost should not be picked up, if it hires outside counsel to do so, as long as the case is not frivolous and it relates to a trusteeship.

Mr. YATES. Why don't you strike the second sentence at the top of page 18 and leave it for subparagraph E, and leave the "courts are authorized to award attorneys' fees and expenses" and so forth.

Mr. HALL. The problem with that is what happens if this new office does not have the staff to handle the caseload and Justice refuses to take it?

There is no option that the tribe would have in those circumstances, except to use its own money, which it is doing now in a lot of cases, to hire counsel.

This allows for, in effect, an expansion of the resources of that particular office. It may not be able to hire a full-time attorney to do so, but it can engage outside counsel——

Mr. MEEDS. You are talking to one of the authors of the Indian Trust Counsel legislation, and I am very much in favor of it.

But this has absolutely no restrictions on it. You set up this office. Those people can go on and take as many cases as they want, and all they have to do is hire outside counsel, if they don't think they can handle it, they don't have enough attorneys, and the Federal Government ends up paying for it. There is no way that you are going to be able, without maior surgery on the last part of this, conform it to what I think has to be done.

I don't want to argue it. Let's just vote on it and get it over with.

Mr. YATES. We are arguing on fundamental points, it seems to me, and I don't know that you are ready to vote until you know what you are going to vote on.

Mr. ALEXANDER. Clearly, the amount that the office could expend for outside counsel is going to be tied to its appropriation process. This is really not a great deal different than the authority that most State attorney generals have, in litigation where there is a special situation, to go out and retain special counsel.

They have got to do it within the budget.

Chairman ABOUREZK. Right now it is not tied to the appropriation. It says "The Government shall engage private counsel" and that means you have got to fulfill that obligation, no matter what the cost.

Mr. YATES. Why don't you give them discretion about payment?

Chairman ABOUREZK. The way to do it is: "The Office shall have a fund appropriated by Congress from which it shall have the discretion to authorize outside counsel".

Mr. HALL. Excuse me, Mr. Chairman, the previous sentence says, "The Office shall have the discretion and authority to engage private counsel" and when it does so, then it pays the cost.

But it does not demand that it do so.

Chairman ABOUREZK. But if they exercise that discretion, then the Government has to pay it, under this law?

Mr. MEEDS. That is right.

Chairman ABOUREZK. Put in there that they shall have the discretion and shall pay the attorneys' fees out of a fund——

Mr. YATES. Why don't you change the word "shall" to "may"?

Chairman ABOUREZK. Appropriated by Congress for that purpose.

Mr. MEEDS. Mr. Chairman, I move we strike paragraph 4.

Chairman ABOUREZK. I want to speak against that. I don't think we ought to remove paragraph 4. I think we ought to alter it, but I don't think we ought to remove it.

Let's bring it to a vote——

Mr. YATES. Mr. Chairman, may I make a motion——

Chairman ABOUREZK. Those in favor of the Meeds motion will say aye.

Mr. MEEDS. Aye.

Chairman ABOUREZK. Those opposed?

[Chorus of No's.]

Chairman ABOUREZK. The noes have it; the motion is defeated.

Mr. YATES. Mr. Chairman, I make a motion on page 18, line 4—excuse me, line 3, "The U.S. Government may pay", change the word "shall" to "may".

In such cases the U.S. Government may pay all fees and costs——

Commissioner DIAL. I second the motion.

Chairman ABOUREZK. The vote is on the Yates motion to insert the word "may" for "shall". All those in favor say aye.

[Chorus of ayes.]

Chairman ABOUREZK. Those opposed, no.

[No response.]

Chairman ABOUREZK. The ayes have it; the amendment is agreed to. Now the vote is on the entire proposition. Let's have a rollcall on that.

On this entire trust counsel concept, as set out on this language.

Mr. YATES. May I ask one question before you vote? And that is on the waiver of sovereign immunity for all actions brought by the Office of Trust Rights Protection.

Is it conceivable that there is some action in which the United States may want to retain the right to be a sovereign?

Mr. MARTONE. If I could answer that, I should think it would. The United States has already waived sovereign immunity to a limited extent under the Federal Tort Claims Act.

But there are specifically enumerated exceptions to that. Certain torts are excluded altogether, so the United States has not waived its immunity.

If paragraph 5 remains as absolute as it is, presumably the United States would be liable for the tort of libel and slander where it is not now so liable under the Federal Tort Claims Act.

Mr. HALL. No; it could not be. This is trust matters only. This is not a blanket waiver of sovereign immunity. It has to relate to a trust issue, and libel does not.

This is virtually verbatim out of the Trust Counsel Authority language.

Chairman ABOUREZK. Then that does restrict it to trust matters.

Mr. MARTONE. We have not defined what "trust matters" is, and we don't know what this waiver constitutes.

Chairman ABOUREZK. Even if we haven't, I think we have, but even if we haven't certainly you are not going to say that a trust matter is a question of libel or slander. No one is going to say that.

Mr. YATES. Why don't you change the line "involving trust matters"?

Mr. MARTONE. I have one other comment. When a party is seeking equitable relief, to seek injunctive relief or require the Government to do something it is supposed to do because of a duty imposed by law, that is one thing, to waive sovereign immunity.

If, on the other hand, you are waiving sovereign immunity to award money judgments against the United States, that is quite another thing.

I don't know whether paragraph 5 goes to one or both of those concepts. But if it is money judgments, where are the limits?

Chairman ABOUREZK. There are no limits set in this statute or any other statute that I know of.

Mr. ALEXANDER. The limits are the same as under the Land Claims Settlement Act. You still have to go to Congress with a judgment and get an appropriation.

Chairman ABOUREZK. That is true.

Mr. MEEDS. If I may say, however, Congress looks upon judgments as obligations of the Federal Government, and does appropriate. So your answer doesn't really do much for me, Paul, in terms of setting limitations.

Mr. MARTONE. If the case were brought against the United States, such as the *Passamaquoddy* case, in which it may be alleged that the United States failed in its trust responsibilities to preserve that tribe's rights to aboriginal possession.

And if a judgment went against the United States in the amount of—whatever half the State of Maine is worth—$10 billion, is that a valid judgment to which Congress wants to appropriate $10 billion?

Chairman ABOUREZK. It can either appropriate it or not appropriate it; as it sees fit.

Mr. HALL. The Indian Claims Commission is doing that now anyway.

Mr. YATES. Was sovereignty waived in the *Passamaquoddy* case? Why do you have to waive sovereignty? In all of these cases that the Indians bring against the United States, must the United States waive sovereignty in order for them to bring it?

Mr. HALL. It has to statutorily waive sovereignty, yes, one way or another.

Chairman ABOUREZK. That was not brought against the United States. It was brought against the State of Maine.

Mr. YATES. I am sorry, excuse me. In a case against the United States, brought by the Indian people. Say, for instance, the *Blackfeet* case, to rescind their leases negotiated through the Department of the Interior, and they sued the Department of the Interior.

Must the United States waive sovereignty for that kind of case, specifically?

Mr. ALEXANDER. That is why you had to establish the Indian Claims Commission, because those suits, for the most part, were not able to be maintained without a waiver of that immunity.

Mr. HALL. Most suits of that nature are brought under something like the Administrative Procedures Act. It has to be under some sort of statutory law which waives immunity.

Mr. YATES. I would like to clarify and say "for all actions involving trust matters brought by the Office of Trust Rights Protection."

Mr. HALL. You mean moving the end of the sentence——

Mr. YATES. I would strike the last three words, I think it makes it more precise if you move it and put it up at the top.

Mr. ALEXANDER. Fine.

Chairman ABOUREZK. All actions in Indian trust matters.

Mr. YATES. Involving trust matters brought by the Office—a private company——

Chairman ABOUREZK. Involving Indian trust matters.

Commissioner DEER. What page?

Chairman ABOUREZK. Page 18, paragraph 5. It would read, then. "The United States waives sovereign immunity for all actions involving Indian trust matters brought by the Office of Trust Rights," et cetera.

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You would then put a period at the end of "Indian" and strike the words "in trust matters" down below. Is there any objection to that amendment?

Mr. YATES. Again, Mr. Martone I would think would have the question as to what "Indian trust matters" means.

Mr. MARTONE. That is right.

Mr. YATES. Maybe the staff would want to think in terms of trying to define what is meant by "Indian trust matters" at a later time, consider it, anyway.

Mr. ALEXANDER. We will consider it.

Mr. YATES. I think there is a possible point there.

Chairman ABOUREZK. Let me ask, first: Is there objection to that amendment? If not, the amendment is agreed to. Are we ready, now, to vote on the entire proposition?

Anybody want to make any further comment? Any other questions?

Mr. MARTONE. I have a comment, simply because you were not here at the time we discussed it yesterday. If it is the consensus of this group that it is somehow in the interest of the protection of Indian trust assets that the United States waive its immunity, I am at a loss yet to understand why it is not also in the interest of Indian trust assets to waive tribal sovereign immunity where there is a dispute between Indian minorities who lose in the tribal council.

And which, under paragraph 4, at the top of page 18, would somehow seek to assert those claims at Government expense.

Presumably, it has to assert those claims against someone, and it cannot now assert those claims against the tribe. It cannot now assert those claims against the United States, even if the United States were to waive its immunity in some cases where the tribe would be held to be a party indispensable.

I use an example that I used yesterday, Senator Abourezk, and that was: If an Indian tribe and its council decided to enter into a lease with a mineral development company and a minority of the tribe disagreed with that, under paragraph 4 that minority could bring an action, presumably at Government expense, against, say, the tribe and the United States.

Paragraph 5 waives the immunity of the United States, but there is no waiver of the tribe. Under existing decisions I am familiar with, of the 9th circuit, since the tribe would be the lessor of that lease, it would be an indispensable party and the case would be dismissed.

This problem is a very real problem, and one that is not at all addressed by this proposal.

Mr. YATES. Could the tribe refuse to be sued?

Mr. MARTONE. It can now. It has the immunity. Congress has granted it.

Chairman ABOUREZK. Let me ask the other staff. Is that your view as well?

Mr. TAYLOR. I think if an Indian individual had a complaint against the tribal government, he would have to bring his action into a tribal court.

There is not a general waiver of the immunity of Indian tribes. The purpose of this bill is to track the provisions of the trust counsel authority.

The basic thrust of this is to establish a Federal power to bring action on behalf of Indian tribes to seek adjudication of their trust claims.

It is not the purpose of this to inject this agency into essentially intratribal or intertribal disputes.

Mr. YATES. Why not? Didn't we read in the newspapers about a question of possible misuse of tribal funds by the tribal leaders?

How would an Indian sue to find out what the truth was in connection with the disposition of that matter?

Mr. TAYLOR. Assuming they are Federal funds, the Federal people come in and monitor this thing.

Chairman ABOUREZK. What about the case of a lease, and there have been cases, a couple I know of.

Mr. TAYLOR. The non-Indian bringing an action against an Indian tribe?

Chairman ABOUREZK. Take the Navajo case, where there are dissidents within the Navajo tribe who disagree with the mineral leases that have been made by the tribe itself.

Mr. TAYLOR. I think his remedy lies within the tribal setting. Either through the tribal court or the political processes of the tribe.

I believe in the Navajo situation there were certainly environmental protection problems that were raised, which became Federal issues.

Chairman ABOUREZK. That would mean the tribe can't be brought into it, because their immunity is not waived.

Mr. ALEXANDER. If we transfer that to a non-Indian setting, X county has a development plan in which a substantial portion of the population, or some portion of the population, disagrees with it.

They look to the laws of that county and that State for their redress. They go into tribal court. They would go into the council. If they don't like the way you are land zoning in Montgomery County, you kick out that board of commissioners in the next election.

You have rights, basically administrative due process rights, that you can litigate up to the Federal courts right now, Indian or non-Indian, in that setting.

Chairman ABOUREZK. Is that true? If the tribes have sovereign immunity and you can't sue them in Federal court, how can you litigate it——

Mr. ALEXANDER. You can sue him in Federal court, under the Indian Civil Rights Act, under the terms of administrative due process, and equal protection type motions in there, and there are lots of cases of that nature.

In other kinds of conflict, if you are talking about how we are going to zone, your challenges—did the zoning commission operate in a form that gives notice, et cetera.

If you cannot get them on the procedural matters, your remedy is political. You kick them out.

Mr. YATES. Haven't you waived tribal immunity insofar as trust cases are concerned by this sentence, the last sentence in the top paragraph on page 18?

> Where there is a conflict of interest between an individual Indian and a tribe involving trust interests the Office shall represent the tribe, shall engage private counsel.

You are establishing a procedure in there for presumably—you are waiving the immunity.

Or are you saying that it is implicit that only in such cases where there is a waiver of immunity that this happens?

Mr. HALL. There could be circumstances in which an individual's interest is not entirely consistent with a tribe's interest, and in that case we are trying to avoid what we are running into now with Interior and Justice being in between the two of them.

Mr. YATES. You are saying there: In such cases the tribe has to give its consent and waive immunity? Or it is waived?

Mr. HALL. We are saying here only that that Office has the responsibility, as opposed to those two, to represent the tribe, as opposed to the individual.

Mr. YATES. What happens to the individual's rights in trust matters? Doesn't the individual have rights in trust matters? Or is it only the tribe?

Mr. HALL. That sentence says that the Office also—as we added the language, "it shall have the discretion to engage private counsel to represent the individual", so both would be represented.

Mr. YATES. You should add another phrase, "and in such matters tribal immunity shall be waived".

Mr. TAYLOR. Congressman Yates, I think when the tribe brings an action in a court, involving a trust matter, they submit themselves to the jurisdiction of the court and they waive it.

They waive it by having brought the action.

Mr. YATES. What if an individual wants to sue the tribe?

Mr. TAYLOR. The individual can intervene in that action.

Mr. YATES. No; an individual against the tribe. He says in certain tribal matters the tribal officers have been guilty of malfeasance with respect to the funds, or with the execution of the leases.

He says, "I want to show that these were done—it was a sweetheart deal and it was not in the best interests of the tribe".

Mr. TAYLOR. This does not waive that immunity; I agree with you.

Chairman ABOUREZK. Say the tribal council signed a lease with Shell Oil Co., it was approved by BIA and the dissidents in that tribe brought a lawsuit in a Federal court saying, "First of all, they screwed us on the lease."

"The tribal government screwed us on the lease and the BIA screwed us by approving the deal." Is that the situation?

Mr. YATES. That is the situation.

Chairman ABOUREZK. That is a perfect textbook situation.

Mr. ALEXANDER. What is your recourse as a citizen of South Dakota?

Chairman ABOUREZK. I am not concerned about that. What is the recourse in that particular situation?

Mr. TAYLOR. There have been numerous cases brought against the Department of the Interior, in their capacity of having approved some action, such as you have described.

Chairman ABOUREZK. What do you do with the tribe in that case?

Mr. TAYLOR. In that case they have a defense of sovereign immunity.

Chairman ABOUREZK. Should they?

Mr. TAYLOR. I don't think we should try to resolve this problem in this trust authority. Maybe this is a problem for consideration in a separate point.

Chairman ABOUREZK. Why not? Why can't we consider it now?

Mr. YATES. Why shouldn't we protect the rights of individual Indians in the event that their tribal leaders have been guilty of malfeasance or misfeasance?

Mr. TAYLOR. I am not sure it is the business of the U.S. Congress to be invading the powers of the tribes and the immunities of the tribes to provide Federal remedies for members of tribes against their own tribal government.

In the Freedom of Information Act discussion, Senator Abourezk, this very argument was made, and you pointed out that that is a matter for the local political body to determine.

That is what self-determination is and what self-government is. I am not sure that we have that many instances——

Mr. YATES. I would like to hear from the Indian members of the Commission as to what they think about this. You are familiar with tribal dealings and the relationship of the Indian to his tribe.

Is tribal leadership so sacrosanct that an individual who thinks that the tribe has been guilty of malfeasance should not be allowed to bring it up? Is this something that the tribe itself should settle?

Or should you give the right to an individual member of the tribe to bring the matter up in court?

Commissioner WHITECROW. I would like to respond to that, Mr. Yates. Presently we have some tribes that have ordinances that take care of situations such as that.

We also have other tribes that have not established any ordinances at all. I feel that this is a personal matter within that tribe.

And if that tribe has leadership that has been guilty of malfeasance in office, the tribal members of that tribe have recourse in removal of that particular individual.

If it is a violation or malfeasance of tribal funds, non-Federal funds, but tribal funds, then the members of that tribe should have recourse in Federal court against those individual leaders.

Chairman ABOUREZK. Under a different statute?

Commissioner WHITECROW. Right, under a different statute.

Chairman ABOUREZK. But he still can't bring anything for their violation of his trust rights as individual trust rights?

Commissioner WHITECROW. Right.

Mr. YATES. You would keep it that way?

Commissioner WHITECROW. Right.

Mr. YATES. There would be no appeal from the decision of the tribe. Would you agree with that, John?

Commissioner BRUCE. I would.

Commissioner BORBRIDGE. Yes; Mr. Chairman, I would view this in the context of the sovereignty of the tribe, and the exercise of its sovereignty as is true in any government, there would be instances of possible imperfections in the exercise of that sovereignty.

These, I feel, very much would be a matter of political concern. I would be more concerned that the further invasion of tribal sovereignty by the Federal Government might result in some unforeseen subsequent invasions with more permanent damage to the tribe and its members.

In almost all instances, I anticipate that the tribes would be acting reasonably through their Council. I think there would be greater damage, were we, acting as representatives of the Federal Government, to sit up here and purport to protect the individual right with consequences we are really not sure of.

I would look to the local activities of the tribe, the members, as being safer corrective action that would, in the long run, be more beneficial, not only to the tribe but ultimately to the wronged individual.

Mr. YATES. What about the case Jim Abourezk cites, of the mineral lease, where the individual Indian then sues the tribe and sues the Federal Government?

The tribe pleads sovereignty, and is immediately dismissed out of the case. What about the Federal Government? Shouldn't it be protected, likewise, in that kind of case?

You waived it so far as the Government is concerned——

Chairman ABOUREZK. It doesn't have anything to do with immunity, then. Under Federal rules, if there is an indispensable party to the case which is dismissed out, the case is over with. The case is dismissed. Am I correct on that?

Mr. ALEXANDER. I did not hear you.

Chairman ABOUREZK. Under Federal Rules of Procedure, if an indispensable party is dismissed out of a case, the case has to be dismissed. You can't continue the case without the presence of that indispensable party.

Mr. HALL. Yes.

Mr. YATES. The question is raised as to whether or not the tribe is an indispensable party in an action against the United States.

Chairman ABOUREZK. What we are doing by not waiving immunity for the tribe in a Federal court, we are saying that an individual cannot sue anybody if there is a bad lease written——

Mr. YATES. Not a bad lease. He can't sue anybody if there is something in the nature of a sweetheart deal, and the tribel chairman has sufficient support of the tribe.

Chairman ABOUREZK. That is right. That is exactly what we are saying.

Mr. ALEXANDER. We are assuming there is no remedy within the tribal context, that that is not effective. I still get you back to the State of South Dakota. The State of South Dakota leases mineral rights in State parks, and it is a terrible deal. You, as a citizen of the State of South Dakota, have redress in the courts in the State of South Dakota to the extent that the State has waived its immunity and provided for those redress systems.

I think the same analogy is true with respect to the tribal settings. There are a variety of techniques, some of them judicial and some of them administrative arbitration boards and, ultimately, political. The other point is that you, as a citizen of South Dakota, have rights vis-a-vis due process, equal protection, procedural due process in Federal court, in relation to the actions of the State of South Dakota.

So do the tribal people, vis-a-vis the Indians Civil Rights Act. The tribe did not follow its procedures, and if the procedures of the Navajo oftentimes call for consultation with the local chapter house, if those are the procedures and they are not followed, you have a violation of administrative due process.

Mr. YATES. Mr. Chairman, I think this is a problem that will be argued at the time the legislation comes up.

My own feeling is, I have a little queasiness about United States waiving sovereign immunity in all actions, even involving trust, and

I may want to reserve a measure on that. I don't know why we would use the word "all".

Chairman ABOUREZK. We will get the views of the administration on that before the issue is passed anyhow. I would like to leave it in and then hear the arguments at that time.

Commissioner BORBRIDGE. Mr. Chairman, I would like to hear from Mr. Stevens on this matter.

Chairman ABOUREZK. Yes; Ernie?

Mr. STEVENS. Mr. Chairman, before you vote, this is the kind of point that constantly comes up. In my tour here in the Commission I have not gone 180 but I have gone at least a 90 within the light of the experiences that I have gone through and opportunities that I have had to learn, and also to observe certain events.

Like, for instance, the Wounded Knee situation. For my part, I have come to the conclusion that as a rule of thumb to reject, at least as a person, any effort to impose some new Federal law or regulation to protect my personal rights, because what is happening, it is something that is really well intentioned. What happens is that tribal government and tribal courts become a facade and a joke, and the only way that the people on Pine Ridge or anywhere else are going to pay attention is if they know it is a for-real drill.

As it is, we are treated to a kind of situation in which it is like a sieve. They are lobbying in the White House. They are lobbying in Congress. They are lobbying in the BIA. They are lobbying with NTC and NCI and they are lobbying us because they know that is where the real power is, with the Federal Government. The fellow from Cheyenne River once said they ought to pass a "leave-us-alone law."

So I think the philosophy that many of the staff people have developed, and I, early on, did not embrace but I have now, I believe that the tribal governments and the tribal court systems and the various other methods we have to govern ourselves will prove adequate, if we are given an opportunity to exercise them.

Chairman ABOUREZK. All right, let's vote. Will you call the roll on the issue of trust counsel authority, as stated in this paper as amended?

CLERK. Commissioner Borbridge?

Commissioner BORBRIDGE. Yes.

CLERK. Commissioner Bruce?

Commissioner BRUCE. Yes.

CLERK. Commissioner Deer?

Commissioner DEER. Yes.

CLERK. Commissioner Dial?

Commissioner DIAL. No.

CLERK. Commissioner Whitecrow?

Commissioner WHITECROW. Yes.

CLERK. Congressman Yates?

Mr. YATES. Yes, with a reservation on "all". Oh—this is without reservation.

CLERK. Senator Abourezk?

Chairman ABOUREZK. Aye.

CLERK. Six for and one opposed.

Chairman ABOUREZK. Next issue.

Commissioner DIAL. I change my vote to "yes".

CLERK. Seven for. Dr. Dial just changed his vote.

Chairman ABOUREZK. OK, note that in the record then.

Mr. ALEXANDER. Point of clarification. In January you voted the first part of the trust chapter. We modified the language, based on the vote.

Do you wish to adopt it as modified——

Chairman ABOUREZK. Tell us what it is. What was the original and how did we modify it?

Mr. HALL. We changed from six principles originally with regard to the policy statement on trust. We condensed that into four, as a result of the suggestions in the discussion that took place in the last meeting.

Chairman ABOUREZK. Which page are you on?

Mr. HALL. The policy statements start on page 14 of chapter 4. The language in those four statements is the same as amended at the last meeting; there has been no change there, except reorganization.

Chairman ABOUREZK. Do you suppose in the next meeting you would number all the pages?

Mr. ALEXANDER. They are numbered.

Chairman ABOUREZK. I have a whole bunch of unnumbered pages in here.

Mr. HALL. Do you have four or six principles?

Mr. YATES. I have six principles in mine.

Mr. HALL. You've got the old one then.

Chairman ABOUREZK. Chapter 4, page 4.

Mr. HALL. Chapter 4, page 14.

Mr. YATES. What are we voting on?

Chairman ABOUREZK. These principles.

Mr. HALL. Those four, as you will recall they were originally six, and they were voted on last time and we voted on the principles in principle as you will recall.

We made changes within them, as a result of that last meeting. For formality's sake we probably should vote on those four again. What is new material here that we did not have in the last meeting is the Indian trust rights impact statement, which also came out of the last meeting.

Chairman ABOUREZK. Let's vote on those four principles now. The issue, then, before us is the adoption of those four trust principles.

Mr. YATES. You don't want to hear from Fred Martone?

Chairman ABOUREZK. If Fred wants to comment on them.

Mr. YATES. I have a comment with respect to No. 1. It says, "The trust responsibility to American Indians is an established obligation." That raises a question.

What is trust responsibility? I assume you will try to define that somewhere along the line; won't you?

Chairman ABOUREZK. Have we attempted a definition of trust responsibility?

Mr. TAYLOR. We have attempted a general description and definition of trust responsibility.

Mr. HALL. All of the commentary in there talks about the trust responsibility definition. Does that mean it includes education services, health services for this particular group, et cetera.

That is where the difficulty is.

Mr. YATES. In voting on this, I assume you are saying whatever the trust responsibility is, that trust responsibility is a legal obligation of the Government; right?

Mr. HALL. That is correct, and we are taking the position that how it is carried out certainly can be changed by Congress over the years.

Chairman ABOUREZK. Shouldn't it be defined somewhere in our report. I think it is a good question that Fred raises.

Mr. YATES. Did he raise it or did I?

Chairman ABOUREZK. Well, Congressman Yates raised it.

Mr. MARTONE. I think it is essential that you do, otherwise you leave the United States open to open ended liability. For example, paragraph A–1 says it is a legal obligation.

You are not talking about something that you want to do for Indians, but something you have to do for Indians. It says, "which requires the United States to protect and enhance Indian lands."

It is one thing to protect existing trust assets, which are part of treaty obligations. It is quite another thing to say that it is within the trust responsibility to go out and buy more lands.

That is simply not the case. The United States may want to go out and buy more lands for Indians. But it is under no legal duty to do so.

Similarly, it says, "in tribal self-government". It is really an unsettled question.

Chairman ABOUREZK. I want to make a suggestion. Fred, do you think, between now and the next meeting, you can come up with your definition of trust responsibility?

As soon as you are done writing it, before the next meeting, mail it to Ernie Stevens, and let them comment on it, add to it, subtract it, whatever they think, and let's try to vote at the next meeting on that definition.

By that time staff will have had a chance to exchange their views.

Mr. YATES. I think that is fair.

Chairman ABOUREZK. We can still vote on these, whether or not we have the definition or not, we can vote on the principles.

Mr. YATES. What is the principle, though? I think he raises a valid point when he says "the trust responsibility requires the United States to protect and enhance Indian lands".

What does that mean? To enhance Indian lands. What does it mean, to enhance resources? What does it mean to enhance tribal self-government?

Chairman ABOUREZK. I think that is fairly obvious; isn't it?

Mr. YATES. I don't think so. What do you mean by "enhance Indian lands"?

Chairman ABOUREZK. To enhance Indian lands is that if there is a requirement to exploit the minimal resources on it, it is the duty of the Government to take care of it, to make sure it is done properly and so on.

Mr. YATES. That is not what that says, necessarily. If you want to say that, that is something else. But I don't know what it means.

What about reforestation? Is the Federal Government required to reforest Indian lands?

Chairman ABOUREZK. I don't know.

Mr. YATES. That is the question. Is that within the phrase "enhance Indian lands"? What does the phrase mean?

Commissioner DIAL. I would like to speak to Mr. Yates' statement. I don't think you can define trust responsibility. This is where you get into the hangup and where the differences come.

You can only give certain characteristics of trust responsibility. Of course, they will vary from person to person, and I don't think you could ever define it.

Mr. YATES. May I, Mr. Chairman, offer a suggestion?

Chairman ABOUREZK. Yes.

Mr. YATES. Why don't we stop, in paragraph 1, after the words "legal obligation", the second sentence, "Trust responsibility to American Indians is an established legal obligation."

Then go on to say, "This includes the duties to provide services for trust protection and enhancement". Why do you need the rest of sentence 1?

Chairman ABOUREZK. What do the other commissioners think about that?

Mr. DIAL. I repeat again. I would put a period after "legal obligation". "The trust responsibility to American Indians is an established legal obligation". Whatever the responsibility is.

Then you go on, "This includes the duty to provide services for trust protection and enhancement."

Mr. HALL. That is even less of a definition than we have got. There is a definition, in terms that we have tied it to Indian lands, Indian resources, and tribal self-government.

If you eliminate that, there is no standard at all.

Mr. YATES. I don't know what "enhanced tribal self-government" means.

Chairman ABOUREZK. You are going to develop a standard by the next meeting.

Mr. TAYLOR. Mr. Martone was asked to develop a standard. We explained in this document that we consciously avoid trying to draw tight limits around the trust responsibility.

We tie it to a concept that the function of government in this country continually evolves. That the time the treaty was written there was no free education in this country, and yet nobody here today is questioning the trust responsibility to participate in the education of Indian children.

At the time of this treaty there was no health care in this country, but nobody here today is questioning this.

Who knows what we are into by the year 2000.

Mr. HALL. We have taken a position that defining the trust responsibility would be not only as difficult, but as dangerous, as defining the Bill of Rights in the U.S. Constitution.

Commissioner DEER. I agree.

Chairman ABOUREZK. Unless it is done on a case-by-case basis.

Mr. HALL. I don't know whether they have got page 12. Do you have a page 12 in your material?

We have taken a position that what trust is in any given time span, any given circumstances, has to be defined in terms of the purpose behind the trust.

That first full sentence on the second line of page 12 says, "As previously stated, the purpose behind the trust was to assure the survival of Indian tribes and Indian people."

Chairman ABOUREZK. You have a definition from page 1 to 12, in fact.

Mr. HALL. That is correct, sir.

Chairman ABOUREZK. Not a precise one, but one which you try to develop.

Mr. HALL. On page 19 we say, "There are three alternatives that could be taken with regard to the definition," and we have taken the middle one.

We have not defined it specifically—exactly nailed it down. But we have defined it.

Chairman ABOUREZK. The Commission has taken the middle ground between these. We elected not to alter a detailed definition of trust responsibility. Not because it is not definable, but because any such definition offered today could very well become obsolete and unmanageable—as the nature and function of the tribal government evolved, as the role in which Indians plan their own culture changes, vis-a-vis that as U.S. citizens.

That is an awfully long sentence, I might say.

Commissioner DIAL. You are saying you can define it, and throughout your statement you say you cannot.

Mr. HALL. I am saying you can, but it would be dangerous to do so. You can, in the sense—to tribe X in State Y, the trust responsibility requires the Federal Government to give them $1 million a year in medical costs or in health care. In North Carolina, the Federal trust responsibility does not require that.

You can lay out a definition like that. But what happens next year, 10 years from now, 25 years from now? That is the reason we don't do that.

Commissioner DIAL. The same way with democracy. You can't define democracy, and I think you are saying the same thing exists with trust responsibility. There is a danger in trying to define it.

Mr. HALL. There is no question that due process of law means an awful lot. It has a very different meaning today than it did 20 years ago.

Chairman ABOUREZK. It changes—the *Miranda* decision—and it has diminished and so on. Well, Fred, I withdraw that statement about your definition.

What you, then, want to work on is what they define in the first 18 pages of this section, and make your observations on that.

You may want to change that next time.

Mr. MARTONE. It may end up having the same result.

Chairman ABOUREZK. Yes, but I think you ought to critique it.

Mr. MARTONE. It is easy to say we are not going to define it, because it is dangerous to define it, because it may exclude certain things. The danger is that unless you do so, if you exclude that everything you do with respect to American Indian tribes is part of a trust responsibility, you don't know, as I have said over and again, whether you are creating vested legal rights, which on subsequent appeal require compensation or may require some other liability.

Or, on the other hand, whether it is a program that is flexible and can be repealed in 10 years with no liabilities.

We know in the case of land what the answer is. At least from *Tee-Hit-Ton* we know what the answer is. When the Supreme Court

looks to see whether or not Congress is going to be abrogating vested property rights which may vest under the due process clause of the fifth amendment, it is going to be looking to see whether or not the Congress has intended to grant vested legal rights.

If so, the Congress is going to be stuck with that. If, on the other hand, you don't want vested legal property rights which might arise under the 14th amendment because of what you do and what your intent is, then you are talking about general Government spending programs, which the Lord giveth and the Lord can taketh away.

But if you are saying the Lord must giveth, because these are trust obligations and the Lord may not be able to take it away without paying, that is a crucial distinction, which classically arises in the situation with respect to land.

We don't know the dimension of it because we don't know what the property right might mean. I warned you, depending on how you define "trust responsibility", courts in future years, including the United States Supreme Court, may decide your intent was to create vested property rights, which cannot be changed, except for things like compensation and so forth.

Chairman ABOUREZK. Can that be corrected, by doing it on a case-by-case basis, much the same as the Bill of Rights is designed now?

Can't that worry be taken care of? I see a distinct problem. I see the problem you are talking about and I also see a bigger problem in my own mind of trying to draw a definition, whether it is narrow or broad or whatever and then having circumstances change and everybody being stuck with the definition that we have drawn.

Mr. MARTONE. I could answer a simple proposal. Why could not the trust responsibility lend itself to a general definition? But the "trust responsibility" is as it arises out of U.S. peculiar relationship to that particular Indian tribe and to insure that anything else you do is not part of that.

Chairman ABOUREZK. I don't know what you mean by "anything else you do is not part of that."

Mr. MARTONE. Your trust duties arise out of your legal obligations to tribes.

Mr. ALEXANDER. You are talking about treaties.

Mr. MARTONE. I may not limit it to treaties, but we are speaking generally here. You may want to do things that you are not legally obligated to do.

If you fit that into the trust responsibility, which is what the tenor of this report is, are you creating a legal obligation for the future?

If you are, then there would be serious questions down the road on whether or not changes in that program, repeals of that program, would result in litigation over whether or not this year you created vested property rights.

Chairman ABOUREZK. I understand that. How are we or the Congress, for that matter, going to go through each tribe in the country and decide and determine what that obligation is?

We can't do it. It is humanly impossible.

Mr. MARTONE. That is why I think it is erroneous to talk about a general Federal trust responsibility and then provide a panoply of programs under that program.

If we are not sure of what that is, you may want to program and not tie it down to a legal obligation and let the existing legal obligation be determined as they now exist.

Chairman ABOUREZK. Would that be taken care of by striking that phrase that Sid moved to strike, which says that it requires the United States to protect and enhance the lands and resources?

I think that might be a safe way to amend the thing, because I think it is fairly clear in all of the decisions in the minds of everybody that there is a minimum requirement of that, as for as trust obligation is concerned.

Mr. MARTONE. If you define, as within a trust responsibility, as a legal obligation of the duty to enhance Indian lands and tribal self-government, it is conceivable that that would indicate to a tribunal that Congress thinks that tribal self-government, for example, is part of, perhaps, liberty under the fifth amendment due process clause.

Such that you might not be able to take that away subsequently, as you did in the fifties, without some serious fifth amendment problems.

All I am suggesting is that there are differences, and I am sure it is sounding like a tired refrain at this point, but there are differences between vested property rights, on the one hand, which arise out of legal obligations and spending programs, on the other.

If you incorporate into concrete your spending programs and call them "legal obligations arising under a trust responsibility", those problems will arise in the future.

Mr. YATES. Why do you say "legal"? Isn't it an equitable obligation? As I remember my law, the trust responsibility is equitable rather than legal.

Mr. MARTONE. In the limited sense of the land situation—when the United States holds legal title as trustee, and the tribe owns the equitable interest in the land.

Mr. YATES. May I ask another question, Mr. Chairman? Let's turn to No. 15, No. 3.

Trust responsibility extends through the tribe to the Indian member, whether on or off the reservation.

His or her rights pursuant to this United States obligation are not affected by services which he or she may receive on the same basis as other United States citizens, or as the tribe might receive as any other governmental unit.

How do we protect the rights of individual citizens if you will not permit the waiver of tribal immunity?

Can the U.S. Government sue a tribe without the tribe waiving immunity?

Mr. TAYLOR. Mr. Yates, to the extent there is Federal money involved, I assume there is Federal——

Mr. YATES. I am not talking about Federal money. I am talking about the trust, which may or may not be Federal money.

Mr. TAYLOR. I think that is what we discussed a few minutes ago.

Mr. YATES. Was only Federal money?

Mr. TAYLOR. No; I am saying where Federal money is involved, and this is generally talking about a legal authority for the Government and a legal obligation or moral obligation to extend social services, and the responsibility to the individual in the United States flows through the tribe.

Mr. YATES. Is the Federal Government's responsibility to the individual not one that flows through the tribe for other things than the provision of social services?

Mr. TAYLOR. No; it flows through for every trust obligation.

Mr. YATES. Then I go back to my argument before, where I asked you about an individual who sues the Federal Government, because there has been a violation by the tribe, if you will, of a trust matter. He sues the Federal Government, and the Federal Government says, "There is nothing I can do."

Mr. TAYLOR. I return to what I said before. I think that is a matter for the individual tribes to determine what waiver of immunity they will undertake.

Mr. YATES. The Federal Government is a sitting duck, then, isn't it?

Mr. TAYLOR. Perhaps we should put in a provision that in any instance where a suit is brought against the United States and the tribe, and the tribe asserts the sovereign immunity, then that immunity shall extend to the U.S. Government also.

Mr. YATES. What happens to the individual?

Mr. TAYLOR. The individual has to seek his remedies through the tribal government. If we don't do that, what really happens is that this panel is sitting here acting as a tribal council for all Indian tribes.

I think that is a total invasion of the governmental rights. We have not enacted legislation——

Mr. YATES. What do you do about dissidents or minority groups? They have to make their way through the regular functions of the tribe.

Chairman ABOUREZK. They have other avenues.

Mr. YATES. I wondered about the rights of minorities or dissidents. What rights do they have?

Chairman ABOUREZK. They are protected under tribal laws and the Civil Rights Act.

Mr. YATES. What kind of dissidents?

Chairman ABOUREZK. They have the Indian Civil Rights Act to fall back on. They explained it earlier. Take the case of the lease. Just say that the individual Indian knows he cannot sue the tribe in the Federal court on a lease.

What he can do is sue the tribal government for doing something wrong in its processes.

Mr. YATES. I am thinking of dissidents and minorities.

Chairman ABOUREZK. I thought about that before, and I brought it up to the staff on many occasions. How do you protect his rights? He does have rights, under tribal law right now, and under the Indian Civil Rights Act.

Let me just ask you: Is he adequately protected under those provisions?

Mr. HALL. It is our judgment that he is; yes.

Mr. TAYLOR. I might say, Congressman Yates, in the event you are not familiar with the Indian Civil Rights Act, it basically parallels the first 10 amendments to the United States Constitution so that his political rights, I think, are adequately protected.

Commissioner DEER. Mr. Chairman, if I hear you correctly, you are making the assumption that the tribal remedies would not be

equitable, that the tribal courts and laws would not be able to deal with the situation.

Mr. YATES. Ada, what I am saying is, as I understand the legal concept that is advanced, and I am not entirely clear about it, the responsibility to the United States in its trust relationship, extends through the tribe to each individual member.

What if the tribal leaders do not protect the rights of certain individual members? The United States would still be responsible for that, because the United States has the responsibility of those individual members.

The protection has been curtailed by the tribal leaders. If there is tribal immunity, how might the U.S. protect the individual member?

Would the United States go into the tribal courts then?

Commissioner DEER. I would assume that would be possible.

Chairman ABOUREZK. It has never been done to my knowledge.

Mr. MARTONE. Even if the United States chose to go to tribal court, the tribe would raise the defense of sovereign immunity in its own forum.

Mr. YATES. What happens, then, Fred? Is the United States liable to the individual member of the tribe for malfeasance by tribal leaders, because it has not adequately protected him in the exercise of its trust responsibility to him?

Mr. MARTONE. I think that is a conceivable result, if this program is adopted.

Mr. TAYLOR. I would not want to see such a concrete result flow, and, Congressman Yates, you are raising an interesting problem here.

But if the United States has that sort of liability to the individual, based on what his tribal government does, then the next step is that the United States steps in and regulates tribal government down the line.

Chairman ABOUREZK. But that is going against what you say our principles should be.

Mr. TAYLOR. These are matters I know I have heard discussed many times before. For example, the regulation of tribal police officers and what the Federal role and responsibility is in that to the extent of regulating the tribal government.

We certainly don't want that result, and if that is going to be an implicit result of the statement here, I certainly would not want this statement retained.

Mr. YATES. What you have done, really, in your statement on page 15, is raise the fear that I had with respect to our previous discussion, where I voted reserving only on "all."

I should have voted as well to express my concern over the protection of the rights of individual members, insofar as the trust responsibility of the United States is concerned in protecting these rights.

What you say on page 3 is that his or her rights—each individual member has the right to be protected by the U.S. Government for the provision of services.

If it is for the provision of services, it is apparently for the provision of everything else as well, the protection of whatever other rights he has as well.

Mr. TAYLOR. Perhaps we need to write some clarification on this.

Mr. YATES. Let's leave it at that.

Chairman ABOUREZK. We are going to have to leave this until next session, if you want to argue it out. Is that all the issues in this chapter that we have to decide?

What about tribal government? No issues in that?

Mr. ALEXANDER. No chapter on that.

Mr. YATES. Where are we, with respect to page 14, paragraph 1? Are you going to include the whole first sentence, which requires the United States to protect and enhance Indian lands and resources and tribal self-government?

I could understand the trust responsibility as meant to protect Indian lands and resources, but I don't know quite what you mean by "protect and enhance tribal self-government."

Mr. HALL. I was going to say it gets back to the discussion we have in the narrative, about the purpose of the trust, from reading the case law and the *Worcester* case is frequently cited as being the genesis, at least in judicial law for the trust.

That case can be viewed as one in which—perhaps Mr. Martone would see it this way—the Federal Government was delineating its responsibilities vis-a-vis States, and its power.

We are taking the position that it was one in which it was delineating power and rights of the tribes, vis-a-vis States, protecting the tribe and insuring the survival of that tribe and its members.

The sources indicate the purpose of that trust is to insure its survival. If you don't have some sort of provision by which you are protecting self-government, then you don't protect the tribe.

Mr. YATES. What about protecting individual rights again, as against the tribe? Is that involved here, too?

Mr. HALL. That particular provision that you are having difficulty with, Mr. Yates, and it is perhaps one that needs some additional explanation, I would agree with you. That is primarily aimed at several cases in which the question arose as to whether an individual Indian living off the reservation, whether there was any sort of Federal trust responsibility running to him at all, even though he may have had trust property.

The cases generally said yes, that the trust runs to the individual involving trust property.

Mr. YATES. Mr. Chairman, I don't want to hold up the vote any longer. But I would be willing to accept that, with the understanding, my interpretation of this paragraph is that there should be no impairment of the right of self-government of the tribe. And that the trust responsibility of the Federal Government does involve the enhancement and protection of the trust resources of the Indian people.

If that is what it says, it is all right with me.

Mr. HALL. That is not using that language, but that is precisely the meaning we had in mind, Mr. Yates.

Chairman ABOUREZK. You mean paragraph 1?

Mr. HALL. That is correct.

Chairman ABOUREZK. Why don't we change it, then, to say, "which requires the United States to protect and enhance the trust resources and tribal self-government" rather than "Indian lands."

Naturally, lands come under the definition of "trust resources." Would that be better? Is there a motion to amend it?

Mr. HALL. It would be changed to read, "enhance Indian resources and tribal self-government."

Chairman ABOUREZK. "To enhance Indian trust resources." Strike the word "lands" and put in "and" and put in the word "trust."

Mr. YATES. And to refrain from impairing tribal self-government.

Mr. ALEXANDER. It has to be more than refrain, because what you are talking about is an affirmative obligation, where the State of Arizona is in a conflict with a tribe, be it the Hopis or whoever, over who has jurisdiction over *x* resource or the State of Arizona is trying to apply its laws in the territory of the Hopis.

Cherokee Nation v. *Georgia*, "the United States should be defending those tribal rights against State encroachments."

Chairman ABOUREZK. Does that do it? Let me read it:

The trust responsibility to American Indians is an established legal obligation which requires the U.S. to protect and enhance Indian trust resources and tribal self-government.

Does that do it, or does it not do it?

Mr. YATES. Is there any responsibility on the part of the United States to protect tribal self-government? Or is it the responsibility of the tribes?

Chairman ABOUREZK. Let's hear from Fred.

Mr. YATES. Is it the responsibility of the United States to protect and enhance tribal self-government, or is that the tribe's responsibility?

Mr. ALEXANDER. It is both, but in terms of the Federal trust obligation there is a responsibility to protect that tribe from whom the courts have called their worst enemies—the States.

In fact, the Justice Department does sue on behalf of the tribes.

Mr. YATES. Does that hold with respect to protecting tribal self-government over matters other than those involving trust matters? Is it to protect tribal self-government in any and all matters, no matter what they are?

Mr. ALEXANDER. In the concept of tribal self-government it would include the jurisdictional rights of the tribe—the sovereignty of the tribe.

Mr. TAYLOR. An example of that would be the *Fisher* case that Fred referred to earlier, on the right of the tribe to govern adoption and foster care.

Mr. YATES. I interrupted Fred.

Mr. MARTONE. Well, to pick that up, where would this position get you over the current state of the law in which a State does have jurisdiction to regulate the conduct and tax and control the lives of non-Indians on reservations?

Absent an impairment under the infringement test. Is this provision to be read to suggest that if a State were to tax a non-Indian entity on a reservation, it is the duty of the United States, where the tribe says it wants to preempt taxation, to enter into the litigation on behalf of the tribe to defeat the State tax?

Mr. YATES. Paul shakes his head, yes.

Mr. TAYLOR. I would, too.

Chairman ABOUREZK. Are you talking about a Public Law 83-280 State?

Mr. MARTONE. It doesn't matter after the *Bryan* case. In any event, I am talking about under existing law a State generally can tax a non-Indian entity doing business on a reservation.

That would be inconsistent with this staff's notion of tribal self-government, but that is the existing law. That is clear from the recent *Moe* case.

Mr. TAYLOR. It would be the responsibility of the Government to represent the tribe, and they are doing that now.

Mr. MARTONE. This provision would require the United States to seek, by litigation or otherwise, to reverse the *Moe* case, in which the Supreme Court held that Montana could impose its sales tax on sales of cigarettes to non-Indians on a reservation.

Mr. TAYLOR. It was required to represent the tribe in that litigation. The Supreme Court has spoken on the issue, but it does not necessarily involve going in and relitigating things that have been established, although I would like to see the *Moe* case over.

Mr. YATES. Would the United States have to go into every case on behalf of the tribes involving questions of self-government?

Mr. TAYLOR. If they are meritorious cases, the answer would be "yes," based on the attorney representation, the trust counsel concept we laid out a few years ago.

Mr. HALL. If the suit could threaten the survival of that tribe, as a self-government unit, yes, they would have to represent it.

Commissioner WHITECROW. I would leave it up to the discretion of the office, as we voted.

Mr. HALL. Yes, not frivolous questions.

Chairman ABOUREZK. How much more do we have to decide today?

Mr. ALEXANDER. The education section.

Chairman ABOUREZK. How many issues are presented in that?

Mr. ALEXANDER. It is categorized in three general issues, and there are specifics under it, which is consolidation of——

Chairman ABOUREZK. Is six a quorum? [Laughter.]

Mr. ALEXANDER. Six is a quorum.

Mr. YATES. You will probably get along faster without me.

Chairman ABOUREZK. Do you want to vote on this issue?

Mr. YATES. Sure, I love to vote.

Chairman ABOUREZK. Is there objection to amending paragraph 1 that says, "Indian trust resources" instead of "land and"? Without objection the amendment is agreed to.

Any other amendments to this section? How about paragraph 3?

Mr. YATES. I will accept it, but I want to state for the record I am concerned with the question of protecting and enhancing tribal self-government.

I don't know quite what that means. Apart from that I will accept it.

Chairman ABOUREZK. Any other amendments? If not, call the roll on those four principles—wait. Let me include the Indian Trust Rights Impact Statement which we pretty thoroughly discussed and agreed on last time in this vote, and we will adopt that principle as well.

All right. Is there a motion to adopt these?

Commissioner BORBRIDGE. So moved, Mr. Chairman.

Chairman ABOUREZK. All right, call the roll.

CLERK. Commissioner Borbridge?

Commissioner BORBRIDGE. Yes.
CLERK. Commissioner Bruce?
Commissioner BRUCE. Yes.
CLERK. Commissioner Deer?
Commissioner DEER. Yes.
CLERK. Commissioner Dial?
Commissioner DIAL. Yes.
CLERK. Commissioner Whitecrow?
Commissioner WHITECROW. Yes.
CLERK. Congressman Yates?
Mr. YATES. Aye.
CLERK. Senator Abourezk?
Chairman ABOUREZK. Aye. So we have adopted the policy recommendations on trust responsibility and the Indian Trust Rights Impact Statement.

There is nothing in tribal government we have to decide.

Mr. ALEXANDER. The tribal government chapter is not redrafted yet. It will be at the next meeting. Nothing in Federal administration or economic development.

Chairman ABOUREZK. Social services—education is in that?

Mr. ALEXANDER. Yes; we discussed health earlier today, but we will rework some of the recommendations. We adopted by vote the child placement recommendations and that was unanimous.

Chairman ABOUREZK. What is the next issue in social services?

Mr. ALEXANDER. The education chapter.

Chairman ABOUREZK. What page?

Mr. ALEXANDER. The third full section in the education section. The recommendations are on page 39, which are approximately three pages from the back of the chapter. Could we have a 5-minute——

Chairman ABOUREZK. Five-minute recess.

[Whereupon, a short recess was taken.]

Mr. ALEXANDER. Senator, there was one point that we were discussing in health care this morning on the Indian Health Care Improvement Act of 1976, which should be put on the record.

I would like to spend what short period of time it will take to do that, and then we can move into education.

Mr. FUNKE. It is my understanding that the new Indian health bill inadvertently repealed the authorization of the Health Services Administration to provide scholarships in the field of——

Chairman ABOUREZK. You mean in terms of scholarships?

Mr. FUNKE. Right; and there was a transfer from the authority of the Health Services Administration to provide scholarships in the Indian health field to the Indian Health Services.

The way the legislation is impacting that, that it immediately terminated the Health Services Administration's authority to provide scholarships. But there is a delay in the term of the appropriations for the Indian Health Service to pick up that function.

There is a period of 1 or 2 years in which there is no authorization to provide scholarships.

Chairman ABOUREZK. That is not a subject for this Commission to come up with, that is a subject for the committees.

Mr. FUNKE. It seems to be an important issue for Indian people.

Chairman ABOUREZK. I agree. Karl, are you willing to prepare a

short memo on what has to be done and give it to me personally and we will get it taken care of over in the Senate and in the House, and give a copy to Frank Ducheneaux.

Isn't he still on the Indian Subcommittee—yes. Give a copy to Frank Ducheneaux and one to me and we will try to get it moving right away.

Thank you for calling it to our attention.

Mr. ALEXANDER. For the education section, we have Rav Goetting and Dr. Laurel Beedon, who worked with the Education Task Force and coordinated this chapter, and I will say a few brief things and turn it over to them.

There are three basic things we are focusing on, because we talked about principles, basically, in terms of the education chapter.

One is a consolidation of the existing Indian education programs into one administrative agency.

Chairman ABOUREZK. What would that be?

Mr. ALEXANDER. Consistent with Commission recommendation for an independent Indian agency, our view is that it should be in that agency.

Lacking that, it would still be consolidated into HEW. If there is not an Indian agency and there is a consolidated Department of Education, it should be consolidated.

Our prime recommendation is that it go into the consolidated Indian agency, consistent with the tenor of the rest of the report.

Chairman ABOUREZK. Are you also recommending that the Indian Health Service go into an Indian Health Agency?

Mr. ALEXANDER. At an appropriate point in time.

Chairman ABOUREZK. Is that the first issue we have to decide? Is it stated where we can look at it?

Mr. ALEXANDER. It is on page 39, the fourth sentence of the page. It is actually recommendation No. 1 in an expanded form.

Chairman ABOUREZK. I agree with the principle of that, personally, Paul, but I am getting back to literary style right now.

Mr. ALEXANDER. As our memo indicated, most of the first drafts, health and education are not in the language that the trust chapter was, in the sense that Congress should do this and that.

It will be converted.

Chairman ABOUREZK. Good. You do it, but you do it later on. It should start out, I think, as a matter of style, "Congress should provide by appropriate legislation" such-and-such.

Mr. ALEXANDER. That will be done.

Chairman ABOUREZK. Are there any questions on this before we vote on it? On this first recommendation. If not, is there a motion to adopt that first recommendation?

It is moved by Louis Bruce.

Commissioner DEER. Seconded.

Commissioner DIAL. I don't have that, Mr. Chairman.

Chairman ABOUREZK. Page 39. Will somebody get it to Adolph, please?

Mr. ALEXANDER. The second basic principle——

Chairman ABOUREZK. We have to adopt this one first.

Mr. ALEXANDER. I'm sorry, I thought you did.

Chairman ABOUREZK. The question is on the motion to adopt principle No. 1. Call the roll quickly.

CLERK. Commissioner Borbridge?
Commissioner BORBRIDGE. Yes.
CLERK. Commissioner Bruce?
Commissioner BRUCE. Yes.
CLERK. Commissioner Deer?
Commissioner DEER. Yes.
CLERK. Commissioner Dial?
Commissioner DIAL. Yes.
CLERK. Commissioner Whitecrow?
Commissioner WHITECROW. Yes.
CLERK. Senator Abourezk?
Chairman ABOUREZK. Aye.
CLERK. Six.
Chairman ABOUREZK. Six for. Nobody voted against. All right, next issue.

Mr. ALEXANDER. In general terms, the next issue is to shift the control of Indian education to the tribes.

Chairman ABOUREZK. What do you mean by "Indian education"?
Commissioner DIAL. I have a question, too.

Mr. ALEXANDER. Let me just say two specific things about this. The context of this chapter is basically tribal. Within that context, the nonrecognized tribes—for want of a better term at the moment—through the administrative procedure that we are recommending, would certainly fit in that context.

In terms of off-reservation education, that is being dealt with specifically in the off-reservation chapter, as a separate issue.

In general policy, what we are talking about in off-reservation communities, mostly urban communities, is increased control as to how those funds are being spent in the public school systems of Chicago, Cleveland, Detroit, and so on.

Chairman ABOUREZK. Johnson-O'Malley funds, for example.

Mr. ALEXANDER. Johnson-O'Malley, title 4, and so on. Direction quite beyond the advisory committee nature that we have now.

Chairman ABOUREZK. Let me ask a specific question. Todd County school system in Mission, S. Dak., is a mixed Indian-white school. The majority are Indian schools.

It is controlled by the county, but funded, in part, by BIA. Do you call that an Indian school system?

Mr. ALEXANDER. What we lay out is a range of possible options for the tribal government in that setting, which range from the tribal government under its own sovereign powers, establishing its school system, shifting down to a passthrough divide for delineated Indian education money through the tribe to a public school system.

Where that is not done, the tribe would have substantial say on how that money is used, particularly in terms of its children.

Laurel, would you explain that in more detail?

Dr. BEEDON. I think one of the major concerns is that school systems receive two types of moneys. One targeted directly to the Indian child, and that would be the Johnson-O'Malley moneys, for example.

The other targeted to the schools, because they are Indian schools, attending as an impact aid, 874 and 815.

Chairman ABOUREZK. In other words, the money should go through the tribes in those two respects?

Dr. BEEDON. Yes.

Commissioner WHITECROW. What about title 4?

Dr. BEEDON. Yes, all Indian.

Chairman ABOUREZK. But Laurel, you have not answered my question on control of that particular school system. There are a great many around the country just like that.

Dr. BEEDON. That school system is receiving moneys from the Federal Government. One, because Indian children go to that school.

Chairman ABOUREZK. Let me stop you again, so that we are not off the point. I understand, and it does not bother me to run the moneys through the tribe.

Mr. ALEXANDER. That is a public school system. If your question is: Is that an Indian school or a public school system? My answer is that it is a public school system.

There are a number of public school systems that have elected Indian members on those school boards, but they are State instrumentalities.

An Indian school system is a system run by the tribe, of the tribal community, and I would include the Lumbees as a tribal community in that context.

Commissioner DIAL. That was my question: What is a tribe?

Chairman ABOUREZK. A BIA school is in an Indian school system; right?

Mr. ALEXANDER. It is a specific Indian school, yes. Lumbees are a tribe.

Commissioner DIAL. Mr. Alexander, what is a tribe?

Mr. ALEXANDER. In my view the Lumbees are a tribe, and in the nonrecognized chapter, and what we state as the principles, as to what the Federal Government should acknowledge its relationship with Indian peoples that it has not so far done.

The Lumbee people qualify on several counts. It is the United States' failure to have so recognized them previously.

Commissioner DIAL. What is a community?

Mr. ALEXANDER. A community is not a political unit, in that context. Anything that is a political unit in my view would be a tribe.

A community may be the urban community of Chicago, where there are several thousand people of a variety of tribal origins, citizenships, what-have-you.

The communities in New England should be more appropriately delineated as tribes. The Mohicans are a tribe. They may be a community of people, but they are a tribe.

They have a common ancestry, a history, a political identity. Those people in our context are tribes. In the nonrecognized section of this report, we hopefully will clean that up once and for all.

Failing that, we may have to make interim recommendations. But that is the main thrust. I agree, if we fail to do that, then there have to be interim recommendations, with respect to how the groups that are not so denoted today are treated.

We will need a whole series of interim recommendations.

Chairman ABOUREZK. Do you go to the question anywhere in here of whether or not there ought to be a separate Indian school system—a separately elected school board by the members of the tribe?

Or should it all be decided by the tribal council itself?

Mr. ALEXANDER. What we say, it is the same decision on Navajo as it is in Montgomery County in Maryland. Those are valid issues, whether you should have locally elected school boards.

Whether the Governor or the Chairman of the tribe should appoint the school board, whether it should be a consolidated school board, whether it should be a local school board.

Those are all valid issues, and they should be argued out in the tribal government—reservation by reservation.

That is our view.

Chairman ABOUREZK. It should not be decided here.

Mr. ALEXANDER. It should not be decided for 300-plus tribes by Congress. It should be decided by the Indian people and in their political framework.

Chairman ABOUREZK. Shouldn't we say that in here?

Mr. ALEXANDER. We do say that.

Chairman ABOUREZK. Where is that?

Dr. BEEDON. Within the text, where it talks about tribal control it gets into the issue that you can start at the very top, the tribe controlling its own school system and going all the way down, depending upon its population, its political feelings, going all the way back to the tribe being merely a monitoring mechanism, to make sure that the funds to which it is entitled get to either the Indian children themselves, or, in the case of impact aid, to the schools.

Mr. ALEXANDER. On page 36, in the middle of the page, it says:

> There is a broad spectrum of feeling on how, within the tribal context, control should be divided. Many tribal leaders feel that to maintain a strong tribal government all the educational decisionmaking should be housed within the leadership of the tribe.
>
> On the other end of the spectrum, local school representatives and community people often feel that schools should be run by the people who are directly affected, parents, students, administrators, and so on.
>
> In addition, there are numerous plans that fall between the total tribal government control and total community control. The point to be emphasized is that the tribe has the right to decide.

Is there any disagreement with any of these concepts? Any questions on it?

Commissioner DIAL. Paul, what specific findings and recommendations, if any, do you have relating to nonreservation Indians?

Mr. ALEXANDER. In this chapter at this moment?

Commissioner DIAL. As of today.

Mr. ALEXANDER. Not in this chapter at this moment.

Commissioner DIAL. What are your plans?

Mr. ALEXANDER. My plan is to treat that in full context at the next meeting when we deal with the issue of nonrecognized in one total package.

Commissioner DIAL. You will include education——

Mr. ALEXANDER. Certainly, in the terms of interim. If we cure the definitional problem, Lumbees fall right in the whole framework here.

Commissioner DIAL. Not just Lumbees. There are a lot of nonfederally recognized, other than Lumbees. About 100 tribes.

Mr. ALEXANDER. Correct. Our approach has been where there was a more specific issue, such as health care for off-reservation Indians, then we treat that in off-reservation specifically, and then tie the whole package together.

Commissioner DIAL. Does your report, as it stands now, reflect the work and the thinking of the task force report on chapter 5?

Mr. ALEXANDER. We have talked with Mrs. Schierbeck several times, and shown her a draft of this chapter a week or so ago.

She is right here, and she could probably answer that. I gather we are in fairly substantial agreement. If not in specifics, at least it is consistent with the task force report.

Mrs. SCHIERBECK. I would say, Mr. Chairman, that the thrust of the education report was that there be a total education policy for all Indians.

Therefore, Commissioner Dial's question about the nonreservation Indian is a relevant question, and would apply also to the urban Indian question.

As I said to Mr. Alexander, I think the problem is a definitional problem, and can be corrected after you look at those other two chapters. But I would certainly hope that your thrust would be for a total education policy, which takes in all Indian people.

Chairman ABOUREZK. Do we state that anywhere in there?

Mr. ALEXANDER. The recommendations, as cast right now, predominantly refer to tribal Indians. In the off-reservation chapter we will tie in the other piece of that package, and in the nonrecognized chapter we will tie in the last piece of that package.

One of the things we have discussed before is the method of producing this report by having it divided up amongst a variety of people.

Once there is a full and complete draft, there may, in fact, be references back and forth, summaries of what is being said in the urban chapter to be reflected in the education section, and so on.

But until we finish all of those pieces, we cannot reflect that total package. I think Mrs. Schierbeck's point is well taken.

Commissioner DIAL. Mr. Chairman, Paul, I believe I would warn you that in your report, which will come up the next time, chapter 10 I believe it is——

Mr. ALEXANDER. Eleven.

Commissioner DIAL. Chapter 11, that there is a danger, if you are not careful, of using it for a catchall chapter. A catchall for nonfederally recognized people, hoping that your mechanics, and so forth, and the way you are dealing with it will automatically take care of education, health, and all problems.

I hope you will give this serious consideration. I believe there is a danger that something can be left out and we come here and vote and that will be the end.

Mr. ALEXANDER. I think that is a very valid point, and I hope you will keep us cognizant of it as we move along.

Commissioner DIAL. Of course you are to send me a report on this before the next meeting.

Mr. ALEXANDER. Certainly.

Mrs. SCHIERBECK. There is one other point, Mr. Chairman, that I would like to suggest in terms of the recommendations.

It seems to me you must have a caveat in that recommendation, which indicates the Federal Government assist the tribes in maintaining State support, which they are entitled to from the public schools.

That is a caveat, I think, that should be included.

Mr. ALEXANDER. That is a good point.

Chairman ABOUREZK. Are you finished with that? Do you deal at all with the Bureau of Indian Affairs' civil service teachers? Do you face that question at all?

Dr. BEEDON. In kind of a backhanded way. I don't talk about it specifically, but that is one of the problems. In recommendation No. 3, I think that reflects the feelings about civil service teachers, which gets into trained Indian specialists.

I am not talking about those of us who sit here at the table and say, "This is the way it should be," but I mean grass roots people who can go into the Indian schools.

Chairman ABOUREZK. That is fine, Laurel, but it does not deal with the existing civil service.

Mr. ALEXANDER. Ray would like to respond to that.

Mr. GOETTING. We are dealing with the Indian preference, and the whole civil service and Indian career position in the Federal administration, in the structure of Indian affairs chapter.

We will cover that for all subjects of contracting or Public Law 638. It is related to those elements as to how it is dealt with and when they do and when they don't employ them under civil service or under tribal employees or as Indian career service.

Chairman ABOUREZK. You are going to set up a separate Indian career service. Will you transfer existing people into that?

Mr. GOETTING. There is a law that allows for certain fringe benefits to be eligible for Civil Service Commission employees who are transferred under the tribal jurisdiction under Public Law 638.

If we actually get the Commission's approval to establish an Indian career service, we will also have certain privileges and requirements to work into that recommendation and that will take care of the points you have in mind.

But that is where we now plan for it to be.

Mr. FUNKE. The Indian Reorganization Act already mandates the separate Indian service, but it has never been implemented.

Chairman ABOUREZK. What about Indian colleges? Will you maintain those in your recommendations, or leave them alone, or what?

Dr. BEEDON. Yes, definitely, in the higher education system. We want to set up an accreditation system for Indian higher education. We will definitely maintain them, and maintain them with their own accreditation system, with the understanding that if they choose to set up an organization such that they move out into the State university system, or with other universities, they set up their own lifeline between them.

Chairman ABOUREZK. What do you do with Indian community colleges?

Dr. BEEDON. Maintain them.

Chairman ABOUREZK. Maintain and increase them?

Dr. BEEDON. If the tribes desire to increase them.

Chairman ABOUREZK. Is there a recommendation that states that?

Dr. BEEDON. No; there isn't.

Chairman ABOUREZK. Should there be?

Dr. BEEDON. Yes. There is a section on higher education.

Commissioner WHITECROW. Ray, do you provide in the Federal administration section the method of administering these funds as they come down in recommendation No. 2 here?

I am concerned with how in the world a public school off reservation receiving Johnson-O'Malley money, would pass money through the tribe. Are you providing a method of passthrough and administrative process by which that school could go through that tribe to get the money?

Mr. GOETTING. Yes; we are really trying to provide a specific manner of budgeting and accounting that responds to the comparison between the two as the justification for and the accountability that is being used for the same justification and purposes for which it was appropriated.

There are some other financing and funding sources that need to be included in it, and in the total budgeting from tribal levels.

If it starts there and would include the coordinated efforts being made by any program, whether it be educational or anything else, it would be identified that way.

At the moment there is not the kind of accountability that answers the question from the tribe: "Have we satisfied our need by virtue of the money we are supposed to have received or not?"

The same thing is the accountability to the Congress of whether or not the Federal Government has not intermingled its funds and used it for other purposes.

The analysis that Mr. Stevens referred to this morning as regards to Public Law 638, whether it be IHS or BIA, the same problems and the same questions and the same justifications and the same accountability that is required periodically, and is often to determine whether or not for tribal review as well as Government review and as well as congressional review that certain things have been done properly and in accordance with justifications.

Commissioner WHITECROW. Let me ask you a question with regard to the current regulations insofar as getting tribal resolutions of support for contracting under those moneys.

Would that particular school—I am talking about here now an imaginary school—having Indian children from all tribes, have to get resolutions of support from all tribes that had members attending that particular school?

Mr. GOETTING. We have not provided for that sort of thing in terms of an individual tribal endorsement.

But recognition and answering of questions ought to be such that the school would know what kind of responsibilities and what kind of reports and that sort of thing were available to the tribe involved.

Chairman ABOUREZK. Ray, let me ask you a question. How does the Oglala tribe handle tribal members going to school in Los Angeles, as far as Johnson-O'Malley funds are concerned?

Mr. GOETTING. I don't think there is an accountability now, but I think if the accountability for Johnson-O'Malley for the Los Angeles schools was appropriated, that the accountability ought to be made on the basis of why they got as much money as they did, and who their enrollment is and why and the number of students.

Chairman ABOUREZK. Who do they account to?

Mr. GOETTING. I don't know who they account to at the moment.

Chairman ABOUREZK. In your recommendation who would they account to?

Mr. GOETTING We would like it to be to the Bureau of Indian Affairs, the same process the money goes through.

Chairman ABOUREZK. Under your proposal, would that money go through the tribe out to Los Angeles?

Mr. GOETTING. No; we have not provided for that as a mechanism through the tribe.

Chairman ABOUREZK. But you don't make an exception here.

Mr. GOETTING. No; there is no exception here.

Mr. ALEXANDER. Implicit here, we are talking about on or near reservation schools.

Chairman ABOUREZK. Then you should make it explicit.

Mr. ALEXANDER. Yes. In the off-reservation section, as we were talking about previously in terms of health care, there is a debate clearly as you well know between using Indian central mechanism as a control device on the local school system for how they expend their moneys vis-a-vis having the individual tribes, wherever they are located, serve as a pass-through device.

I think the general tendency that we have—we have discussed this issue several times—would be that administratively you have to have a local entity to be able to have direct input into the educational decisionmaking in Los Angeles.

That might well be an urban Indian center, or something.

Chairman ABOUREZK. Shouldn't we recommend it or exclude urban Indians from this section?

Dr. BEEDON. That I was going to cover in the section for urban Indians, but I will put that in, make a statement that this does not cover——

Chairman ABOUREZK. I don't think we are prepared to vote on these other three sections. I think we have got some work to do on them.

Commissioner DEER. Mr. Chairman, I have a question. Do you address anywhere here the problem of graduate education for Indians?

Dr. BEEDON. No; only higher education.

Commissioner DEER. I think this is a very important area.

Dr. BEEDON. I would like some input on that, too.

Commissioner WHITECROW. Mr. Chairman, I am going to be writing the recommendation for the delivery of contract health care money to the tribe, and I would also like to include in my recommendation and make the Commission alert, I would also include recommendations for education money passing through the tribe.

Chairman ABOUREZK. I honestly think you have quite a bit of work to do in this section. I think it is going to be a very weak section unless you do something and become a little more specific in what you want to do here.

The statements you have here, I believe, are too general to be of any value, and you leave out so much that it further diminishes the value of the section.

We are not going to ask you to cut off your foot, but we would like to ask you to do some more work on this section.

Commissioner BRUCE. Mr. Chairman, I would like to agree with Ada. Could we have some recommendation pertaining to the graduate student level?

I think that is very important. We are getting demands for those engineers, doctors, and everything else.

Mr. STEVENS. I want to point to something I see left out. In your response to the career service business, and their idea of turning it over to Indians, it seems to me it leaves a big hole.

What about Haskell? What about the school in New Mexico? What about the school in Utah, that has civil service employees? You are just going to let that go on because there is no provision for somebody to take that over because that is a multitribal unit?

What about the other part—for those who want to have Haskell be a real college or university and all that—what is the answer toward dealing with these present Federal employees?

I submit that the 1934 act went much further than these recommendations in terms of Indian control, and they provided, for instance, for tribal supervision over Federal employees.

In other words, Ray, I don't think that our thing on the career service will entirely cover it. I am just submitting that to you. How in the world are we going to get control of our colleges?

Mr. GOETTING. There are two things under Public Law 638, and under contracting for schools, and an entity would have to be established as a school board for contracting with the Bureau or with the Federal Government to operate.

The theory that has been established now for the board of regents on those schools has been selected from various areas throughout the country.

The problem with that is that those people are not selected by representations from a specific area. The first appointees are self-perpetuating, and they are like a trust and like an advisory board.

These are the kinds of things that are covered there, and what we were intending to cover in Federal administration, so that the source of funds and the authorization by which you finance the school, no matter where it is, would be considered with regard to how it has to be governed.

If that governing board is elected from the various areas of the operations, and this was one of the questions I have specifically before we started with Paul, as to how do we decide where this consolidation is governed, if there is not immediately a separate agency.

The point being that if the entitlement and the trust portion that applies to Indian education were in the prime agency or the BIA, good or bad, is one thing.

A supplemental operation for any school comes from USOE, and there has been an expression—and in our interview with Demmert, the Director of Education at BIA, would like to see those two separated, so that things that apply similarly to all schools would apply to Indian schools.

Things that would apply to a trust would apply to trusts through the Bureau or through the central agency or whatever is established.

There is an interim step in here that has to be developed and correlated with how you run off-reservation boarding schools. We had one on Cheyenne River that I worked with Wayne Ducheneaux on.

It had a problem with financing, when the Bureau and the tribe and county established a couple of schools. Primarily one was Indian and one was not. The source of funds from that county, all funds will be given to that school that they raised.

And yet they had a savings account of $1 million and they did not know where it came from or how it was raised. So we had to resolve some sort of problem with regard to how they felt they could withhold any bank surplus money, when the agreement said all the money they raised would be put in the benefit of that school.

Yet they were hampered by operations and could not audit that. We need to understand our relationships with such kinds of schools that we enter into agreements with, whether they are in the public system or not.

These kinds of questions, I think, we yet need to resolve. Same thing you asked, Mr. Chairman——

Chairman ABOUREZK. And they can be resolved by the next meeting, so we can have something in front of us.

Mr. ALEXANDER. Right. As I said, this is a first shot. Most of it is oriented toward general principles and we will be refining it. There are gaps and we would acknowledge that.

Commissioner BRUCE. I want to make a point about the civil service part of it, as far as the teachers are concerned.

When I was Commissioner I visited all of the boarding schools, and I don't know how many times I was told that this is not my responsibility because I am off duty at 4 o'clock.

"That's not my responsibility." We were being criticized for the lack of activities in the boarding schools because of civil service regulations requiring overtime for extra duties.

There ought to be something brought forth about this. We have problems with tribal councils controlling teachers—all working as civil service employees working for tribal councils.

Chairman ABOUREZK. There are no more issues to vote on today?

Mr. ALEXANDER. Not today. no.

Chairman ABOUREZK. Adolph, you might want to catch your train. There will be no more votes today.

Commissioner BRUCE. May I ask a question? We are to come back to the health report?

Mr. ALEXANDER. Yes; we will.

Commissioner BRUCE. Don't forget, I have a good, solid housing report to make.

Mr. ALEXANDER. OK, at the next meeting we will hopefully try to focus specifically on the recommendations.

We will have an enormous volume of material for the next meeting.

Commissioner DEER. It was mentioned before, but I don't think we did anything, and that is the critiques of the task force reports.

Some of the task force reports are up to par and some of them are not. I, myself, would be interested in having the critiques of the task force reports made a part of our published material, so that people will have this to compare.

Chairman ABOUREZK. Are they already critiqued?

Mr. ALEXANDER. There are a number of outside forces that have evaluated, more or less, different task force reports.

Sometimes the evaluations are substantial; sometimes they are peripheral. I take it you are talking about staff evaluations?

Commissioner DEER. Yes.

Mr. ALEXANDER. Those are available.

Commissioner BORBRIDGE. Mr. Chairman, I would like to ask another question, if I can. What is contemplated with respect to the transcripts of the Commission meetings that have been held?

Chairman ABOUREZK. They will go into the National Archives, available for public inspection.

Mr. ALEXANDER. I believe the transcripts of these meetings are being printed.

Chairman ABOUREZK. How many copies?

Mr. RICHTMAN. One thousand copies.

Chairman ABOUREZK. They will also go in the Archives. We will have 1,000 copies printed and they will go into the Archives.

Commissioner BORBRIDGE. Of all the transcripts?

Mr. RICHTMAN. All the Commission meeting and hearings.

Commissioner BORBRIDGE. They will be mailed in boxes to the Commission or just available if we want them?

Mr. RICHTMAN. We will mail them to you. Those are the corrections you have been making for the past meetings.

Commissioner BORBRIDGE. That is what I wanted to check. Thank you.

Commissioner BRUCE. The point is, that Commissioner Borbridge is bringing up, we are all being asked. "Do you have a copy of task force 3?" or whatever. If we have just one, that is the end of it.

We hope you will reserve enough for us to distribute, as they ask for them.

Mr. RICHTMAN. Yes.

Mr. GOETTING. I would like to make one comment in response to Ada's mention a moment ago about graduate students.

In our budget process we are attempting to identify the various levels in accordance with some tribal input and some tribal request.

They want to know what is the difference and what progress at the elementary level, secondary, postsecondary, college graduates, and professionals.

We hope in our budget process—and the statistical material we gather—would answer that and provide budgetary information, so that we could analyze progress on it.

Commissioner DEER. I'm sorry; what was your question?

Mr. GOETTING. I just answered your comment.

Commissioner DEER. OK.

Mr. GOETTING. What I said, Ada, was that in the budgetary process, starting at the bottom, the tribes and a lot of people have asked for information in regard to various programs about the elementary, secondary, postsecondary, college graduate, and so on, so that they could measure the value of progress of the accomplishments of Indian people toward educational goals.

And if the budgeting and programing and accounting were all done the same in gathering statistics for management information as to how and when the evaluations of educational accomplishments were made, we would have that information for you.

On that basis, we would have that for you.

Commissioner DEER. Mr. Chairman, I understand there is a critique that will be done of the Commission's work, and it might be possible——

Chairman ABOUREZK. Who is doing the critique?

Commissioner DEER. This might be a possible way of having these task free reports—critiques of the reports publicized.

Chairman ABOUREZK. How do you want to publish them? Where would they be published?

Mr. STEVENS. The Commission could consider whether they wanted to submit that to Congress. We started this and we said that after we are done with the report we will do a whole review of how the Commission thinks, had they to do it all over again, this was good, this was bad, this worked, this didn't.

The point being that we might let people know how they should approach this kind of question.

Chairman ABOUREZK. I think it should be published, but I don't think it should be made a part of the report itself.

Mr. STEVENS. Oh, no; this would be after the report is published.

Chairman ABOUREZK. It is fine with me. Do we need to vote on it?

Mr. STEVENS. I don't think so.

Chairman ABOUREZK. Let's just do it.

Commissioner BORBRIDGE. Mr. Chairman, I note that we have spelled out in specific language a resolution that we dealt with only conceptually the other day.

Chairman ABOUREZK. Does anyone have any changes they would like to make?

Commissioner BORBRIDGE. The only comment I would have or request for clarification as the chairman understands this, and it would be with respect to the language, "to vest all legislative and oversight jurisdiction on Indian matters".

I am assuming "Indian matters" would encompass, among others, Alaskan Native matters.

Chairman ABOUREZK. Yes, I think it is close enough for this purpose. They will do what they want to anyway, but they are getting an expression of what we would like to see.

I don't think it would do us any good to get too specific.

Commissioner BORBRIDGE. No.

Chairman ABOUREZK. Will the staff transmit this resolution by letter for my signature to Tip O'Neill, the Speaker, Jim Wright, majority leader, and Mo Udall, chairman of the Interior Committee—3 people.

Anything else that needs to be brought up before we adjourn? Let me bring up, then——

Commissioner WHITECROW. I would like a point of clarification, Mr. Chairman. I would like to ask our staff director to go down the list of chapters that we have agreed to and those chapters that we still have remaining.

Mr. STEVENS. Let me go over what we have done, and what is remaining, and then I will let Paul do the part about what we are voting on and so on.

The first part is that we have remaining chapters 3, 5 and 8.

Chairman ABOUREZK. Remaining to do what? Approve the first draft?

Mr. STEVENS. Yes.

In other words, there are recommendations and parts of contemporary conditions of Indians, tribal government and social services,

where there are either sections missing or recommendations that have to be done.

It is not on the schedule, but chapter 1, history of Indian-U.S. relations, and, 2, legal concepts and Indian law, are substantially completed.

It could be reviewed at the last session, just before we distribute that, the March 9 session. Then, what remains after completing chapters 3, 5, and 8, right off at the next set, what we have left is to do markup sessions, which we have not dealt with, in the chapters on Federal administration, economic development, off-reservation Indians, terminated Indians, nonrecognized Indians, and special problem areas and general subjects.

I think that the parts that are most controversial and continuously under heavy discussion we have painfully waded through, up to this point.

Many of the things that we have left are not that controversial, for the most part they are not. For instance, Federal administration——

Chairman ABOUREZK. We have already adopted most of that.

Mr. STEVENS. Just the principle. We didn't deal with any recommendations.

Chairman ABOUREZK. So we are going to do that February 24, 25, and 26. Assuming that we markup all those other sections during that time, you are going to come back in about a week, apparently, for a final review and approval of the tentative final report.

In other words, if we mark up by February 26: Can you get everything changed by March 4?

Mr. STEVENS. Sure.

Chairman ABOUREZK. That is a week's time.

Mr. STEVENS. We have a 24-hour service on transcripts, so what has got to happen is that on February 24, 25, and 26, we will get our transcripts back immediately.

Basically, what we are talking about is setting up about 1 week to do all this stuff. I would like to remind everybody——

Chairman ABOUREZK. Speaking of transcripts, I think we might as well adjourn the meeting. We can discuss this without putting it on the record. I don't think we need this; do we?

All right. The meeting is adjourned.

[Whereupon, at 3 p.m., the meeting of the Commission was adjourned.]